

INDEX.

	Page
Statement of The Facts.....	2-14
The Fort Street Decisions.....	3
The Fort Street Case Decree.....	6
The Constitutional Provision.....	7
Day to Day Arrangements.....	8
The Plan in Question.....	8
Bill of Complaint.....	9
Motion to Dismiss.....	10
Pre-Existing Power to Remove.....	10
The City Charter.....	11
The Seven-for-a-Quarter Arrangement.....	13
 Argument	 15-84
I. Question of Jurisdiction.....	15
The Federal Question must be Real and Sub- stantial	 15
The Alleged Ground for Federal Juris- diction	 17
No Actual Threat to Take at Less than Fair Price	 19
Lawful to Make an Offer, or Request Re- moval	 22
No Purchase of Railway's Property without another Vote	 25
The Election and Ordinance Nothing to do with Purchase of Railway's Property..	 26

	Page
II. The Bill Discloses No Equity.....	30
Alleged three grounds for Equitable Relief..	30
A. First Alleged Ground answered.....	31
B. Second Alleged Ground answered.....	33
The so-called Acts of Recognition.....	34
The Alleged New Franchise Rights in Fort Street and Woodward Avenue..	37
A Decisive Answer.....	38
The Denver Water Case.....	39
The Constitution is a Bar.....	42
As to Estoppel.....	44
Estoppel by Inaction of the People.....	49
A Refined Distinction About the Kind of Franchise	53
"Revocable at Will".....	54
About an Implied Franchise.....	57
C. Third Alleged Ground answered.....	60
What Misrepresentation or Misunder- standing existed?.....	60
Ballot requirements	63
No Misrepresentations to Electors.....	66
The Proceedings in this Instance.....	74
Contents of Proposition.....	79
(a) Absence of Certain Phrase.....	79
(b) Suburban Lines	81
(c) Instructions to Voters.....	83
Appendix	86-93

LIST OF CASES CITED.

	Page
Attorney General vs. Lindsay, 178 Mich. 524.....	11, 12, 78
Attorney General vs. Pingree, 120 Mich. 550.....	77
Attorney General vs. Detroit Common Council, 148 Mich. 77.....	77, 81
Attorney General vs. Common Council, 164 Mich. 371.....	78
Angle vs. Chicago Ry., 151 U. S. 1.....	67, 68
Allen vs. State, 44 L. R. A. (N. S.) 468.....	67, 72
Anchor Investment Co. vs. Columbia Elec. Co., 61 Minn. 510..	64
Bridge Co. vs. U. S., 105 U. S. 470.....	54, 55
Burton vs. Detroit, 190 Mich. 196.....	63
City of Detroit vs. D. U. R., 172 Mich. 136.....	3
Chesapeake vs. Manning, 186 U. S. 245.....	67, 68
Clark vs. Los Angeles, 160 Calif. 48.....	64
Crane vs. Reeder, 25 Mich. 303.....	62
Calder vs. Michigan, 218 U. S. 591.....	54, 56
Cole vs. Cedar Rapids, 118 Iowa, 334.....	46
City Ry. vs. Citizens Street Ry., 166 U. S. 567.....	44, 45
D. U. R. vs. Detroit, 229 U. S. 39.....	3, 23
D. U. R. vs. Detroit, 248 U. S. 429.....	7
D. U. R. vs. Michigan, 242 U. S. 253.....	38
Denver vs. New York Trust Co., 229 U. S. 123.....	22, 32, 42
Denver vs. Water Co., 246 U. S. 178.....	33, 39, 40
Detroit vs. D. U. R., 107 Mich. 320.....	36
Detroit vs. Robinson, 38 Mich. 108.....	43, 44
Dickson County vs. Field, 111 U. S. 83.....	46
Defiance vs. Defiance, 13-23 Ohio, C. C. 96.....	47, 48
Daniels vs. Long, 111 Mich. 562.....	47, 48
Eaton vs. Shiawassee Co., 218 Fed. 588.....	43, 46
Essex vs. N. E. Telegraph Co., 239 U. S. 313.....	44, 45
Eddy Co. vs. Crown Point, 3 L. R. A. (N. S.) 684.....	46
Epping vs. City of Columbus, 117 Ga. 263.....	67
F. & F. Co. vs. Woodhull, 25 Mich. 99.....	69
Fletcher vs. Peck, 6 Cranch, 87.....	71
Fletcher vs. Judge, 81 Mich. 186.....	52
Greenwood vs. Freight Co., 105 U. S. 13.....	54, 55
Gilleland vs. Schuyler, 9 Kan. 569.....	73
Harris vs. Rosenberger, 145 Fed. 449.....	16, 17, 25
Hamilton Gas Light Co. vs. Hamilton, 146 U. S. 258.....	54, 56
Hedger vs. Drdon Co., 150 U. S. 182.....	43
Hagerman vs. Hagerman, L. R. A. 1915 A. 904.....	46, 47
Jones vs. Caldwell, 21 Kan. 186.....	73
Kansas vs. Bradley, 26 Fed. 289.....	17

	Page
Kreman vs. Portland, 57 Ore. 454.....	62
Lynchberg vs. Person County, 169 N. C. 159.....	47, 48
Lake County vs. Graham, 129 U. S. 674.....	46
Lewis vs. Bourbon County, 12 Kan. 186.....	73
Litchfield vs. Ballow, 114 U. S. 199.....	43
Madera Water Works vs. Madera, 228 U. S. 454.....	23
McCrag vs. U. S. 195 U. S. 27.....	32, 67
Morris vs. Vanlaningham, 11 Kan. 269.....	72
McCurdy vs. Shiawassee Co. 154 Mich. 559.....	43, 44
Newburyport Co. vs. Newburyport, 192 U. S. 561.....	16, 22, 24, 32
Niles Water Works vs. Niles, 59 Mich. 211.....	43
New Orleans vs. Warner, 175 U. S. 126.....	67, 70
Olivers vs. Lainsville (Ky), 217 S. W. 997.....	63
People vs. Gardner, 143 Mich. 104.....	32, 67
People vs. Gibbs, 196 Mich. 127.....	32
Peck vs. D. U. R., 189 Mich. 242.....	54, 56
People vs. Calder, 152 Mich. 724.....	67
Parkersburg vs. Brown, 106 U. S. 427.....	46
State vs. Winnett, 16 L. R. A. (N. S.) 149.....	63
State vs. Longworthy, 55 Ore. 203.....	63
Sioux Falls vs. Farmers' Loan & Trust Co., 126 Fed. 721.....	65
State vs. Allen, 176 Mo. 555.....	65
Spltnor vs. Blanchard, 22 Mich. 246.....	43
State vs. Murphy, 124 Mo. 548.....	46
Salt Creek Township vs. King Iron Co. 51 Kan. 529.....	47
Smith vs. Newberg, 77 N. Y. 126.....	47, 48
State vs. Pullman, 23 Wash. 563.....	47, 49
Soon Hing vs. Crowley, 112 U. S. 719.....	67, 71
State vs. Gordon, 222 Mo. 1.....	65, 71
Underground R. R. vs. New York, 192 U. S. 416.....	16
Washington vs. Deney, 4 Wash. 125.....	63
Wormstead vs. Lynn, 194 Mass. 425.....	47
Wheeler vs. City of Denver, 231 Fed. Rep. 16.....	78
Wildman vs. Anderson, 17 Kan. 244.....	73

IN THE

Supreme Court of the United States

DETROIT UNITED RAILWAY, Plaintiff and Appellant, vs. CITY OF DETROIT, et al., Defendants.	}
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October Term, 1900.
No. 492.

**BRIEF FOR DEFENDANT ON FINAL HEARING,
AND ALSO ON MOTION TO DISMISS.**

The defendant, City of Detroit, moved, at the opening of this term, to dismiss or affirm or advance and this Court granted the motion to advance and reserved until the hearing of the case the motion to dismiss. We now urge the dismissal of the case and in default thereof the affirmance of decree below.

Some of the grounds to be urged are applicable alike to the question of jurisdiction and to the merits; we shall endeavor to repeat the arguments as little as possible.

This suit is one of a series of vexatious suits brought by the plaintiff to prevent the City of Detroit from carrying out the expressed will of a vast majority of its citizens at an election held April 5th last, wherein the people approved the proposition, to acquire its own street rail-

way lines upon certain specified streets of the town; and to issue \$15,000,000 of bonds for that purpose.

The pretended ground of federal jurisdiction is that city officials propose to compel plaintiff to sell its rails and equipment on two streets in Detroit (Fort Street and Woodward Avenue) at an inadequate price, but the real object of the suit is to set aside the election and thwart the city in its efforts to acquire adequate transportation facilities. The alleged ground of jurisdiction is so thin as to be transparently gauzy and the other grounds of complaint alleged, are equally, we think, without any foundation in justice or in law.

STATEMENT OF THE FACTS.

Detroit had more than doubled in population within the previous ten years and the utter inability of the plaintiff company to cope with the existing situation became so apparent and the inconveniences of citizens so great, that the city administration, headed by Mr. James Couzens, as Mayor, submitted a proposal to the electors on April 5th, as is required by the Constitution and the law, to authorize the city to acquire a municipal system on certain streets and to issue \$15,000,000 in bonds for the purpose. The proposed system in the main covered certain new streets and also two streets (Fort Street and Woodward Avenue) where the plaintiff company had long operated, but on which its franchises had expired, and also some streets on which the defendant company had in recent years constructed street railways under what are known as "Day to Day agreements," with stipulations to sell to the city at an arbitrated price.

After an extended discussion, participated in by all the newspapers and scores of public speakers, in which every

phase of the proposition was debated, the proposal was carried by a vote of 89,285 to 51,093.

No sooner was the vote announced than this bill, together with a number of others, in the State courts, was filed by the Railway Company, to block the work. This suit, like the others, is based upon the flimsiest of technicalities, designed to thwart the mature judgment of the people and their administration in acquiring new facilities which are absolutely essential to the prosperity and growth of the town.

In 1910 the franchise of plaintiff expired on the chief trunk lines, and, notwithstanding the plain language, plaintiff, in defiance of the express written word, claimed to have perpetual franchises on those streets. Fort Street was made a test case, and the Supreme Court of Michigan held (and this was confirmed by the Supreme Court of the United States) that plaintiff's franchise having expired, it had no further rights upon the streets and that it must vacate upon notice of ninety days, given by the City Council (see Decree, R. p. 43).

City of Detroit vs. D. U. R., 172 Mich. 136.

D. U. R. vs. Detroit, 229 U. S. 39.

This decree was made February 28, 1913, and affirmed by the Supreme Court of the United States May 26, 1913.

The Fort Street Decisions.

In that case the Supreme Court of Michigan held:

(1) That there was no implied obligation after the termination of a franchise to permit the railway or to require the railway to continue the operation of the rail-

way upon reasonable terms, even though the requirements of the public required the same.

(2) Upon the expiration of the term of franchise, the rights of railway company terminate unless extended by mutual arrangement.

(3) The construction of a franchise where susceptible to two interpretations is always in favor of the municipality.

(4) No estoppel arises against a municipality because of inaction on the part of its officials.

(5) Upon the expiration of the franchise the railway company became a trespasser in the streets and the city could compel it on reasonable notice to remove its property.

In that case the railway company argued that it had a duty to the public to continue operation and on the other hand a right to continue to operate so long as public necessity or convenience required. On this subject the Court said:

"This argument seems to be based upon the assumed necessity of the continued use of the tracks of defendant for the comfort and prosperity of the public. It is evident that the municipal authorities are duly constituted as representing the people of the city, and it is the only government agency provided, as municipalities are now constituted, for conserving the interests of the public. For the purpose of carrying out these views of defendant no method is formulated, and there does not appear to be any which the Court may utilize unless the idea of perpetuity is accepted. The constitutional agency provided to conserve the interests of the public has in this case expressed what may be considered the desire

of the public relative to its interests. We think that in advancing this argument the fact is overlooked that constitutionally enacted statutes and ordinances have provided when the terms of these franchises expire, and also determined the contractual relations which were created by the acceptance of franchises lawfully granted. Taking, as we do, this view of the situation, we do not recognize the existence of the implied obligation claimed" (p. 149).

In the same case on appeal the Supreme Court of the United States affirmed the decision of the Supreme Court of Michigan, and among other things held:

(1) That franchises to street railways in streets must be in plain language, certain and definite in terms and contain no ambiguities. They are to be strictly construed against the grantee.

(2) That there was no force in the claim of an implied contract to permit the railway to remain in the streets after the expiration of franchise. Under such reasonable arrangements for public service as the situation might require,

"the right to grant the use of the streets was in the city. It had exercised it, had fixed by agreement with the railway the definite period at which such rights should end. At their expiration the rights terminated. The railway took the several grants with knowledge of their duration * * * The rights of the parties were thus fixed and cannot be enlarged by implication. A street railroad is authorized to operate for a definite time and has enjoyed the full term granted, it may, upon failure to renew the grant, be required within a reasonable time to remove its property from the streets."

The Fort Street Case Decree:

The decree of the Supreme Court of Michigan in the Fort Street case (R. p. 42), as affirmed by the Supreme Court of the United States, declared that the franchise had expired and that:

“All contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following named streets (describing the Fort Street line fully) expired by limitation June 30, 1910, and that the Detroit United Railway has no rights or privileges upon any of the said streets
* * *.”

Then it declared that the railway having refused to comply with the terms proposed by the Common Council,
“is without any rights in or to said streets and it has been and is a trespasser in continuing to occupy them and operate cars thereon.”

It then provided the Common Council might require the railway to cease the operation of its cars and by resolution required the removal of the property from the streets, and

“such removal shall be effected by said railway company within ninety days after notice of said resolution,”

unless time extended by Common Council. And it further decreed in case the railway company failed to comply with said resolutions

“then the Circuit Court for the County of Wayne in Chancery to which the case is remanded, upon its application of the city shall forthwith issue its peremptory writ of injunction to enforce the cessation of operation and if the defendant shall not

remove all of its property from said streets within the time allowed then the Circuit Court in Chancery, upon like application shall forthwith issue its writ of assistance to compel and effect the removal of the railway's property from said street" (R. pp. 42, 43).

The right of the city to order the railway's property off the streets was reaffirmed in the Kronk Ordinance case, so-called.

D. U. R. vs. Detroit, 248 U. S. 429.

The Constitutional Provision:

Throughout the present case it becomes vital to know that prior to the expiration of these franchises and in the year 1908, the people of the State of Michigan adopted a new Constitution, after prolonged deliberations of a representative convention consisting of many of the best minds of the State. For years controversies had existed relative to the rights of railways in the streets both before and after the expiration of franchises. The new Constitution made provision on that subject as follows:

"Nor shall any city or village * * * grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city * * *."

Article 8, Section 25, Constitution of 1908.

Every fact entering into the consideration of this case, every step taken, has been made in full view of this Constitutional provision.

Day to Day Arrangements:

Following the two decisions in the above mentioned case, the Common Council of Detroit and the railway company, complying with the above Constitutional provision, made "A Day to Day" arrangement, fixing the fares, revocable at the will of either party (R. pp. 44-46).

The parties being well aware of the lack of power of the council or officials to grant any term rights whatsoever, entered into a revocable day to day agreement; and such has been the practice in Detroit on all streets where any new work has been done since 1910 (R. pp. 23-26).

Every dollar expended by the railway company in new rails or new construction, out of its unceasing flow of revenues from these streets, has been made with the utmost deliberation under this Constitutional provision, and under the most solemn agreements capable of being formulated and agreed to by competent parties, that it would claim no rights in the streets by virtue of such new works (see the Agreements, pp. 44-46, 23-26).

The Plan in Question:

The great growth of Detroit rendered more mileage imperative and the railway company protested it could not get the money—at any rate, it did not give the service; hence the city administration formulated the plan in question and obtained from the people the needed approval and money.

Notwithstanding every obstacle plaintiff has thrown in the way, the city's progress with this plan has been

steady and marked, and many miles of work on the new lines have been laid.

Bill of Complaint:

The Bill of Complaint is very long, verbose and argumentative, even abusive of the city and its officials. Its great length and involved, obscure allegations are such that in view of the different rulings of this Court that the bill should state facts and not evidence or arguments, and that grounds of jurisdiction should be alleged plainly and in clear and simple language, we submit the case ought to be dismissed for violation of these rules.

The bill in substance alleges three grounds for relief:

(1st) That the election was void because the voters were misled and the proposition improperly submitted.

(2nd) That plaintiff has gained continuing rights in Fort Street and Woodward Avenue since the decisions of the Supreme Courts of the United States and Michigan in the Fort Street case, which rights the officials threaten to disregard.

(3rd) That the city officials were intending, acting under the ordinance and election, in bad faith to threaten to throw plaintiff's property off Fort Street and Woodward Avenue, with the real intent of not doing so but of compelling plaintiff to sell its property in those streets at an inadequate price. (This last is the sole alleged ground of Federal jurisdiction.)

Motion to Dismiss:

The defendant moved in the court below to dismiss the bill on two grounds:

(1st) That no Federal question was shown to give the Court jurisdiction, and

(2nd) That there was no equity in the bill which entitled plaintiff to relief.

After argument, Judge Tuttle held that he would take jurisdiction of the case, not because any Federal question was really involved, but because plaintiff made a claim of one, apparently in good faith. The learned Judge then proceeded in an oral opinion of great clearness to point out that there was no equity in the bill on its face (R. pp. 57-60).

Pre-Existing Power to Remove.

The City of Detroit and its officials had full power to acquire and operate street railways before the ordinance or vote in question in this case.

The following enactments (Constitutional, State legislative, city charter and ordinances) fully provide for this, and the city was not dependent in any way upon the ordinance or vote in question in that behalf.

The Constitution adopted in 1908 authorized municipal ownership.

Article VIII, Section 23, provides:

"Subject to provisions of this Constitution, any city or village may acquire, own and operate
 * * * public utilities for supplying * * *
 transportation to the municipality and the inhabitants thereof * * *."

Section 25 provides:

"No city or village shall have power to abridge the right of elective franchise * * * nor shall any city or village acquire any public utility or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors * * *."

Pursuant to the above Constitutional provisions, the State Legislature passed enabling legislation which has been from time to time upheld by the Supreme Court of Michigan.

The first Home Rule Act, under this constitutional provision, Act 279 of the Public Acts, was approved June 2, 1909 and Sections 4 and 5 of this Act specifically authorize the amendments of city charters to provide for municipal ownership of transportation utilities.

The Verdier Act, so-called, being Act No. 5 of the Public Acts of 1913, was approved March 11, 1913, and it authorized cities to make so-called piecemeal amendments of their respective charters, for this purpose, without a revision of the entire charter. The constitutionality of this legislation was sustained in:

Atty. General vs. Lindsay, 178 Mich. 524, 527.

The City Charter:

Immediately following this legislation, proceedings were taken to amend the charter of Detroit to provide for municipal ownership. On April 7, 1913, four several charter amendments were carried by large majorities,

giving Detroit the power and right to acquire such facilities. See the history of this in:

Atty. General vs. Lindsay, 178 Mich. at pp. 538, 544, 545.

These charter amendments gave full power on this subject to the city. Section 1 provided:

"The City of Detroit shall at once proceed to and as soon as practicable acquire, construct, own and operate a street railway system upon and above the surface of the streets of the City of Detroit * * *."

Sections 2, 3, 4 and 5 provide for the creation of the Board of Street Railway Commissioners, its organization and its powers.

Section 6 provided:

"It shall be the duty of said Board to proceed promptly to purchase, acquire or construct and to operate street railways in and for Detroit, and as soon as practicable to make said system exclusive * * *."

Section 7 said:

"The Board may purchase or lease or by appropriate proceedings prescribed by law, condemn all or any part of the existing street railway property in the City of Detroit * * *."

Section 8 said:

"Any contract to purchase or lease herein contemplated or any plan to condemn existing street railway property, shall be void unless approved by three-fifths of the electors * * *."

Section 9:

"The Common Council of the City of Detroit shall on request of said Board issue bonds of the City of Detroit, to be known as general bonds, to the amount of two per cent of the assessed value of the real and personal property of the city."

The new City Charter adopted by the people June 25, 1918, contains substantially the same provisions as the original charter of 1913 above quoted. A copy of this is printed as an appendix hereto, post p.

Act No. 119 of the Legislative Acts of Michigan of 1919 adopted a carefully drawn condemnation statute in which Section 1 provided as follows:

"Any city in this State having a population of 25,000 or more is hereby authorized to take for public use the absolute title in fee to any public utility for supplying * * * transportation to the municipality and inhabitants thereof * * *."

The Seven for a Quarter Arrangement:

Following the decisions in Fort Street case, above stated, and in line with those decisions and the constitutional provision above quoted, a day to day arrangement for operation was made between the common council and the railway company, fixing fares, which was revocable at the will of either party. It consisted of the letter from the president of the railway company to the mayor and common council, dated August 5th, 1913, stating the proposed terms, which were accepted by resolution of the common council and approved by the mayor. This provided for a fare of seven tickets for twenty-five cents, a single cash fare to be five cents and for certain

workingmen's tickets; and the proposal from the railway over the hand of its president ended with the following provision:

"It is further understood that no existing rights of either the City of Detroit or the Detroit United Railway shall be impaired or affected in any wise by this temporary arrangement, except as herein explicitly stated, and that it is a Day to Day Arrangement only."

The resolution provided for acceptance and:

"Be It Further Resolved, That while this resolution shall be in force, the enforcement of the decree in the case of *Detroit vs. Detroit United Railway* (describing it) shall be suspended and immediately after repeal of this resolution the present existing status as to such decree shall be restored and the city may at once enforce the terms of said decree, the same as if this resolution were not passed * * *.

And Be It Further Resolved, That this resolution may be repealed at any time by the Common Council." (R. pp. 44-46.)

The expenditures alleged in the Bill of Complaint, on Fort Street and Woodward Avenue, as also the enormous revenues derived by the railway from those streets, were made and received under the terms of the above described arrangement, and in deliberate contemplation by the railway of the decisions and decree of the Fort Street rental case and the constitutional provision above cited.

ARGUMENT.

Question of Jurisdiction:

This defendant has insisted from the outset of this case that no Federal question was raised or involved by the Bill of Complaint and hence that the Federal courts are without jurisdiction. This the defendant still contends and it now urges that the District Court from the beginning was without jurisdiction and it prays this Court to enter the appropriate order or decree.

The Federal Question Must Be Real and Substantial:

The judge below, in his logical and illuminating opinion, which was delivered orally at the conclusion of the arguments, said:

"As I view it, the most difficult question is the one as to whether or not a Federal Constitutional question is involved. In the light of the recent decisions, I reached the conclusion that it is my duty to take jurisdiction of the case, but I do so on the theory that the Federal question is raised in good faith, and not because when such question is properly answered the bills show any invasion of constitutional rights" (R. p. 57).

The learned Judge gave plaintiff credit for good faith in starting this suit although he promptly decided every question raised by plaintiff's counsel adversely.

We submit the Court was too generous—there could be no good faith (belief in the ground for Federal jurisdic-

tion) without at least a plausible ground for it. We argue that good faith is not enough to give jurisdiction but there must be a really substantial question about which open minds could differ.

And so are the authorities:

Newburyport Co. vs. Newburyport, 193 U. S. 561, 576, 579.

Harris vs. Rosenberger, 145 Fed. 449, 452.

Underground R. R. vs. New York, 193 U. S. 416.

1st U. S. Compiled Stat. 16, Sec. 1019 (Jud. Code, Sec. 37).

In the *Newburyport* case, *supra*, Chief Justice White said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial but is without color of merit" (citing cases, p. 576).

And again:

"Concluding for the foregoing reasons that the rights asserted in the bill under the Constitution upon which the jurisdiction of this Court depends, and upon which also the jurisdiction of the lower Court depended, were so attenuated and unsubstantial as to be devoid of merit, our duty is to direct that the decree of the Circuit Court be reversed at appellant's costs, and that the case be remanded to that court with instructions to dismiss the bill for want of jurisdiction" (p. 579).

And in *Harris vs. Rosenberg*, *supra*, VanDevanter, Circuit Judge, said upon this question of jurisdiction of the Federal courts:

"The claim must be real and substantial, not merely colorable or without reasonable foundation"

He also spoke in that case words which will be found directly applicable to this case as follows:

"Whether the question of the construction or application of the Constitution is real and substantial or is merely colorable and without reasonable foundation, depends, *inter alia*, upon whether it is an open one in the Supreme Court or has been solemnly and directly determined by that court. As was said by Mr. Justice Brewer, then Circuit Judge, in *Kansas vs. Bradley*, 26 Fed. 289:

"When a proposition has once been decided by the Supreme Court it cannot longer be said that in it there still remains a Federal question. More correctly it is said that there is no such question, State or Federal." "

The statute itself, *supra*, provides that if such suit does not *really and substantially* involve a controversy properly within the jurisdiction, or that parties have been joined for the purpose of creating a case cognizant in said court, the Court shall proceed no further.

The Alleged Ground for Federal Jurisdiction:

The *only* ground alleged for Federal jurisdiction is that the city officers, acting by authority of this new ordinance and election, were about to attempt to force the plaintiff to sell its property in certain streets (Fort Street and Woodward Avenue) at an inadequate price,

by threatening and pretending that the council would order plaintiff to remove from those streets and thus force the company to sell at a low price, rather than be compelled to take up the property with the attendant sacrifice. From this the inference is drawn that it was a taking, or threatened taking, without due process (R. pp. 16, 19-20; Brief for Appellant, pp. 28, 31, 32, 33).

On this subject the bill alleges (R. p. 16):

"The method of accomplishing said dishonest and unlawful purpose the said Mayor and some of his associates have many times openly and publicly stated to be (indeed, the intent and purpose to use this method is clearly indicated in the Mayor's message to the Common Council, Exhibit 5, and the sample ballot, Exhibit 6) that he will offer to plaintiff the sum of \$40,000 for each mile of track (including overhead equipment) so to be taken, which sum is—as is well known to said Mayor and his associate defendants—less than one-half of the fair value thereof, and that if such offer is not complied with, he and his associate defendants will order said tracks and equipment removed from said streets."

* * * * *

"The claimed power of so ordering the said tracks and equipment to be removed is to be exercised only as a pretense, pretext and subterfuge for the accomplishing of the said iniquitous scheme of taking said property from the plaintiff for use as a street railway in its present precise condition and in the manner in which it is now used, without paying fair and reasonable compensation therefor."

And further (R. p. 21) :

"Plaintiff further avers that it is the intent and purpose of said defendants, note particularly the Mayor's message submitting the ordinance—which purpose they have threatened to execute—to say to plaintiff, 'You must either sell your trackage at the inadequate price the city offers, or cease operating your cars thereon and tear up and remove the same from the streets.'

This in the circumstances stated in this bill is, plaintiff avers, a resort to illegal means to compel plaintiff to sell its property for an inadequate price, and to thereby deprive it of its property without due process of law in contravention of the due process of law clause of the 14th amendment of the Constitution of the United States."

Plaintiff recognizes that if the city actually *intended* to oust the company from Fort street there would be no invasion of its rights. The question of federal jurisdiction therefore depends entirely upon the occurrence of some official act less than actual ouster, namely, pretended action looking towards ouster.

No Actual Threat to Take at Less Than Fair Price:

The bill sets forth the alleged threats but an examination of them as alleged do not bear out the charge of "threats to take at less than a fair price" as will now be seen.

In a thoughtful explanatory communication (see the whole communication, R. pp. 51-53) to the Common Council, Mr. Couzens, the Mayor, said :

"The Class A system provides the taking over of 34.25 miles of line built under the so-called 'day

to day' agreements, in which the city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about \$40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which, it is safe to assume, the railway will be glad to deliver us in preference to getting off the street, at say, an estimated cost of \$40,000 per mile.

This aggregates a total of \$2,220,000 for lines already built. The additional new lines proposed in Classes A and B system aggregate 100.75 miles, at an estimated cost of construction of \$70,000 per mile, which totals \$7,052,500.

In addition to this, assume we purchase 400 cars equipped with motors at an estimated cost of \$10,000 per car, which would aggregate \$4,000,000 and 150 trailers, at an estimated cost of \$5,000 per trailer, aggregating \$750,000, or a total of \$4,750,000 for cars and trailers, to which we have added \$1,000,000 for car barns, tools and miscellaneous equipment.

This totals in the aggregate \$15,022,500."

On the map (R. p. 52) a "financial plan" for A.B. lines was given, containing this statement:

"Present trackage to be taken over at cost less depreciation, as specified at the time the company was given permission by the city to build under a day to day agreement: 34.25 miles estimated at \$40,000.....\$1,370,000

Fort and Woodward tracks where franchise has expired, 21.25 miles, estimated at \$40,000.....	850,000
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New tracks in unserved districts, 100.75 miles, estimated at \$70,000.....	7,052,500"
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The above are the threats as alleged in the bill. You will thus see that Mr. Couzens' engineers estimated the second-hand tracks and fixed equipment as worth \$40,000 per mile. New lines were estimated at \$70,000 per mile. Under the day to day agreements the city and the company agreed that the city should take over the same at cost less depreciation (R. p. 25, face of pamphlet, p. 52) and this trackage and equipment Mr. Couzens also estimated as \$40,000 per mile (R. p. 52).

This price may be too low or too high, but it was never stated, speaking as to either of the lines, to be anything but an *estimate*. Mr. Couzens estimated that under the arbitration the price of the second-hand trackage and fixed equipment would be fixed at \$40,000 per mile, because that, in his judgment, and in the judgment of the engineers, was a reasonable price; and exactly the same reasoning applied to the similar second hand trackage and fixed equipment on Fort Street and Woodward Avenue. These estimates were put forth to the public purely as estimates and as stated, they may have been too high or too low but they were only estimates.

It is thus plain that all plaintiff's alleged fears of an evil intent on the part of the City officials to take at less than fair value, are fanciful—merely imagined for the sake of jurisdiction.

It Is Lawful to Make an Offer, or Request Removal:

But if the alleged scheme were carried out precisely as claimed, (even including the violent manner described in the lurid language of the bill) it has been held to be a perfectly valid and lawful course by the Supreme court of the United States. In other words, this Court has held that the City has a perfect right to make an offer to the Railway Company of a certain price for its tracks and equipment and in default of acceptance, to ask it to remove its property and this court has held that such course is not a taking of property without due process.

Denver vs. New York Trust Company, 229 U. S. 123.

That case on this proposition seems to be identical with the case at bar and to dispose of the question of jurisdiction. There the franchise of the water company had expired and the property of the water company was appraised at \$14,000,000.00 by appraisers. The offer of the City was \$7,000,000.00 or an alternative of the City building its own plant, and thus ruining the other. With reference to this question, the Court, speaking by Mr. Justice Van Devanter said:

"The next objection invokes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and is, that the charter amendment subjects the water company to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant, and that this amounts to an unlawful deprivation of property. The objection

is faulty in that it fails to recognize the real situation to which the charter amendment applies. The water company, although the undoubted owner of the physical property constituting its plant is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired; and the city not only is under no legal obligation to renew the franchise or to purchase the plant, but is free to construct and operate a plant of its own. How then, can it be said that the proposal, expressed in the amendment, to purchase the company's plant at \$7,000,000 and to devote \$1,000,000 more to its betterment, or else to construct a new one at a cost of \$8,000,000 involves an unlawful deprivation of property or any right? See *Madera Water Works vs. Madera*, 228 U. S. 454; *Detroit United Railway vs. Detroit*, ante, p. 39. Whether \$7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard for its own interests. That the City, mindful of its interests, offered \$7,000,000 for the water company's plant, when it could have proceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter. *Newburyport Water Co. vs. Newburyport*, 193 U. S. 561, 577."

So also, *Newburyport Co. vs. Newburyport*, 193 U. S. 561. In this case the plaintiff claimed that it was deprived of its property without due process, under the Fourteenth Amendment.

"The bill based this contention upon the charge that as the legislative act which gave the company the privilege to sell to the city, if it chose to do so, was coupled with the right conferred upon the city, if the company did not sell, to erect a water plant of its own, the sale by the company was compulsory, since the execution by the city of the authority to erect its own plant would have worked the ruin of the water company" (566).

The Court speaking by Chief Justice White, said among other things:

"Now it is conceded that the charter of the Water Company was not exclusive, and was subject to repeal, alteration or amendment at the will of the legislature. This being the case, it is evident that no deprivation of property without due process of law . . . did or could arise from the act empowering the city to erect its own water works. The legislature could therefore have exercised this power without compelling the city to buy the plant of the Water Company. The bill proceeds upon the theory that if this right had been exerted the company would have been ruined and the value of its property destroyed. . . . The advantage resulting from the power conferred upon the company to sell enured to its benefit since it saved it from a ruin which otherwise would have been occasioned. No compulsion in any legal sense can be said to have been exerted on the company by the option given

it, because the exercise by the company of the option, upon its own theory, saved its property from destruction" (577-79).

It would be presumptuous for us to attempt to add anything to the powerful reasoning of these two opinions on this subject.

Thus we have affirmed by two decisions of the highest court, that if the precise steps were taken which the bill says were in contemplation by the city officials, and if these steps were successful, there would be no taking of property without due process. This court having twice decided that the very steps alleged to be threatened on this case do not constitute "a taking without due process," we submit there can be no good faith allegation of a Federal question, "it cannot be longer said that in it there still remains a Federal question."

Van De Vanter J. in Harris vs. Rosenberger, 145 Fed. 452.

It would seem that this ought to dispose of the question of jurisdiction, but there are other good reasons for the same conclusion.

No Purchase of Railway's Property Without Another Vote:

All the counsel on both sides agreed in the Court below, that the ordinance as adopted by the council and the authorization as voted by the people did not in any manner authorize the acquisition of plaintiff's property in said streets (Fort Street and Woodward Avenue) and that in order to acquire such property by purchase an agreement with the Company must be entered into, a definite and specific agreement fixing the price, and

then the agreement submitted for approval to the vote of the people *at another election* (R. pp. 59, 80).

The fundamental law of Detroit, namely, its Charter, forbids the taking of any street railway property by purchase (or by condemnation,) except under a specific contract of purchase approved at an election by a three-fifths vote (R. p. 18).

The ordinance and election sought to be set aside in this case did not cover any such authorization.

All of the counsel agreed before the Court below (Rec. pp. 59-80) that none of the plaintiff's rails or other property in the streets could be taken by the city without another vote of the people, after a contract was arrived at *with the assent of the plaintiff company*.

Therefore, the pretended fear of the plaintiff that it was to be forced by this ordinance or election or either one of them, into an agreement to sell at an inadequate price, (which is the sole ground of federal jurisdiction claimed in this case) is but a figment of the brain of counsel, a figment not even dreamed by counsel, but artificially conjured up for the purpose of the case.

The Election and Ordinance Nothing to Do With Purchase of Railway's Property:

But counsel for the plaintiff say to the City: "You may (in fact you intend to) force us to a low price below the true value, by threatening to order us to vacate the streets." If that were true, the city's right to order plaintiff off the streets is given or rather confirmed by the decisions of the Supreme Courts of Michigan and of the United States above cited. But

such right does not arise out of and is not strengthened in any way by this ordinance or vote of the people. *It can only be taken by orders of Common Council under the decree of the Court, and this order by the Common Council could still be passed and the plaintiff ordered off the streets even if the ordinance and election were declared void.* This removal from Fort Street could have been commanded at any time since the decree in 1913 without any such ordinance as the one now attacked. There is no connection or relation between the election or ordinance sought to be set aside and the right to order the Company removed or the actual vote of ordering their removal.

The proposal to purchase plaintiff's lines on Fort Street and Woodward Avenue could not have been submitted in the ordinance in question because no agreement existed with the plaintiff and this is an essential preliminary.

Furthermore, the Common Council under previous legislation and the Charter provisions had full power to deal with the subject matter of and removal of the Fort Street tracks and other tracks where franchises had expired, entirely irrespective of this vote of the people. This is shown by the history of the legislation, charter provisions, etc. (ante pages 10-13). All that the election in question did was to approve the acquisition by the city authorities of a system upon certain streets described, and to provide money for the purpose. *The election proposition did not specify how the commission or council should proceed to acquire—this was left to their judgment and discretion in the exercise of lawful means, as was the only wise and proper course to pursue.*

The acquisition of these particular lines (Fort Street and Woodward Avenue) from the plaintiff is still ahead of the city and when in due and orderly course that point is reached, it will be done according to law.

Therefore the only alleged ground for jurisdiction, viz: That the City or rather the defendant officials intended to order the railway company to remove its property off certain streets, or that the officials pretended that such steps would be taken, utterly fails because the ordinance and vote afford no authority for such steps and they add nothing to the power and right previously possessed by the City under the decisions of this Court and the Supreme Court of Michigan, and the charter provisions.

But, Counsel say (brief p. 9), that the bill alleges it has rights to those streets, (Fort Street and Woodward Avenue) acquired subsequent to the decisions of the Supreme Courts of the United States and Michigan mentioned above, and that the Mayor and Common Council have decided upon a policy of forcing the plaintiff, without judicial action upon those after acquired rights, to submit to having its property destroyed by removal and for the ultimate purpose of forcing plaintiff to dispose of its property at an inadequate price. (That such pretended after acquired rights cannot possibly have any existence is shown in this brief post pages 33-59.)

Whether plaintiff has any such after acquired right can be tried and determined when the Common Council attempts to order the plaintiff Railway off the said streets, but no such attempt has been made as yet and the first step will be the passage of a resolution in pursuance of the decree in the Fort Street case. When

such attempt shall be made, if the plaintiff have such after acquired rights, the Court will protect them. If the City officials had such a plan in mind as alleged, their first step would be to pass a resolution to remove and that will be time enough to litigate the question of after acquired rights. *The question is not raised nor the alleged right questioned by the passage of this ordinance or the vote of the people.*

The City cannot force plaintiff into a contract of sale by physical force and if attempted the Courts would enjoin it,—but this ordinance or vote has nothing to do with such a case.

The ordinance is in no way essential to the City's right to eject plaintiff, which right existed before the ordinance in question was passed, and has not been fortified or strengthened in any way by such ordinance or vote. The only effect of the passage of the ordinance and vote is to provide the money (which might have been raised by taxation or other method) with which to build the system in question.

When the City comes to pass a resolution to eject or order plaintiff off the street the matter then comes at once to the Court under the decree already made in the Fort Street case for a writ of Assistance, (See the Decree, R. p. 43) at which time plaintiff may set up its after acquired rights. And if the attempt were to eject from Woodward Avenue on the ground that its franchise expired years ago, then the Court will protect any after acquired right the Company may have.

In fact these questions are now being determined in the State Courts on a bill filed by the City to declare the respective rights in those streets (other than Fort Street) where franchises have expired.

II.

We Submit That the Bill Discloses No Equity:

If the Court should be of the opinion that a federal question is involved, and therefore entertain jurisdiction, we urge that the bill does not state any case for relief.

Three grounds for equitable relief are alleged:

(1) Threatened injury through bad faith of the city officials, in that they intend to threaten to remove plaintiff from the two streets in question, with no real intention of doing it, but only to compel plaintiff to sell at less than the fair value.

(2) That plaintiff has acquired additional continuing rights in Fort Street and Woodward Avenue since the decisions in the Fort Street case, by reason of certain acts of recognition and estoppel on the part of city officials and the people, which rights the city officials threaten to disregard.

(3) That the election was void because the voters were misled by the city officials, and the proposition was improperly submitted.

Of these three in their order:

A:

Threatend injury to plaintiff by reason of wicked, intent of city officials to compel plaintiff to sell its rails and fixed equipment on Fort Street and Woodward Avenue at an inadequate price, by threatening to compel plaintiff to remove such property, without any real intention of compelling the removal, and thereby forcing plaintiff into a sale below value.

This position has already been quite fully answered in this brief, pages (17-26), in discussing the question of jurisdiction, and we refer to the arguments there submitted.

But in addition, we submit that a malicious intent of the mayor to drive "a hard bargain" cannot be ground for depriving the city of its rights—its unquestioned rights, especially since the Mayor has no legislative power to do the act plaintiff asserts is threatened.

This Court and the Supreme Court of Michigan, after exhaustive consideration, held the city had the right, after the franchise expired, to order plaintiff to remove its property. It is not possible that the City can be deprived of this right because some officials intend to say to the Company, "If you are not willing to accept a certain price, the City will pass a resolution requiring you to remove your property."

Twice this Court has held, under substantially similar circumstances, that not only has the City a right through its officials to make such statement to the company,

but that no wrong is committed in case it succeeds, after making such statement, in securing a lower price.

Denver vs. N. Y. Trust Company, 229 U. S. 123;

Newburyport Water Co. vs. Newburyport, 193

U. S. 561, 577.

Any other rule than this would be the height of absurdity, because it would mean that the parties could not negotiate, but that the City must either pay *any* price that plaintiff might choose to ask, or adopt the alternative of compelling evacuation without negotiation.

On the other hand, it is not to be forgotten that the Railway Company has a "big stick" in the negotiations, in that the City does not want service interrupted while removing the old railway and building a new one. May not the Company use that "stick" in making a sale? To say it cannot do so is absurd. There is nothing illegal in its making use of such argument. The same is true of the City. It may urge that the Company would much better yield something from its notions of full value rather than scrap the materials.

Each side has a strong argument, and each may advance it without violating any legal or equitable right of the other.

We submit that the City's rights cannot be taken away or the City estopped or enjoined from exercising its legal rights by any so-called evil intentions or evil motives of its officials. It would seem unnecessary to cite authorities for so elementary a rule.

Evil motives in exercising legal powers by public officials will not vitiate the act, nor will they be inquired into by the judiciary.

McCray vs. U. S., 195 U. S. 27, 54, 55, 56;

People vs. Gardner, 143 Mich. 104;

People vs. Gibbs, 186 Mich. 127.

B.

The second ground for equitable relief is that plaintiff has been given new continuing rights on Fort Street and Woodward Avenue since the decisions of the Supreme Courts of the United States and Michigan in the Fort Street case, by reason of certain acts, agreements, resolutions and ordinances.

It is declared that these acts of recognition were such as to show an imperative need that cars should continue to operate on Fort Street and Woodward Avenue, which were vital portions of the City's system of transportation; and that, therefore, by reason of these acts, the City had conferred upon the Railway Company continuing rights in those streets under the doctrine of the decision in *Denver vs. Water Company*, 246 U. S. 178, 190.

The plaintiff claims in its bill, in almost the identical language of the Denver decision that,

"In consequence of said several acts and proceedings of said common council and the city officials, and of said expenditures under city authority on Fort Street and Woodward Avenue, and its continued operation thereof with the knowledge, consent and approval of the city authorities, and by reason of the facts in this and in the preceding section of this bill, No. 4, set forth, the right of the City of Detroit to require and enforce the removal of said Fort Street lines * * * and Woodward Avenue * * * has ceased; and that the plaintiff has acquired and has the right, and is charged

with the duty of continuing to maintain and operate said lines of street railway in the streets where they are situated *until such time as the discontinuance of such maintenance and operation shall be consistent with the public interest*" (Rec. pp. 7, 8).

The So-Called Acts of Recognition:

The principal acts of recognition (and in fact the only ones set forth so that one may judge of their import) are the "Seven for a quarter" arrangement; the "Day to Day Arrangement" for new lines, the so-called Kronk Ordinance; the Chancery suit mentioned in the Bill; the knowledge of large expenditures upon the lines.

(1) *The "Seven for a quarter" was that of August 7th, 1913, which is set forth in record page 44, 46, made between the D. U. R. and the Common Council, it has never been repealed, although the Railway Company abandoned it as the bill alleges on the—— day of—— (R. p.——), and arbitrarily installed a much higher rate of fare. That "Seven for a quarter arrangement" explicitly provided that it should not affect the rights of either party, that it was 'day to day' only, and that immediately upon repeal of the resolution the existing status as to the decree should be restored and that the City might at once enforce the terms of the decree.*

(2). *The so-called Day to Day Agreements under which several new lines were constructed by plaintiff, provided expressly that the City might purchase the lines thus constructed at cost less depreciation, whenever it should go into municipal operation (R. p. 23-26)*

and also in addition thereto, that the Railway Company, by acting under it, secured no term rights in the streets, but that the Council or the people of Detroit, at their pleasure or caprice, could revoke the permit and the Company would immediately forthwith remove its property, and in the broadest possible language, that action under this Day to Day Agreement should not waive the rights of either party in any way, but each reserved all its rights whatever they might be.

In the face of these most explicit legal and moral undertakings, plaintiff in direct repudiation of its plight-ed word claims in this suit that these acts confer upon it continuing rights in the streets of Detroit.

Is it any wonder the City authorities regard it as dangerous to have any dealings with this company which treats the most solemn engagements as mere "scraps of paper."

(3) *The Kronk Ordinance* contained this final clause:

"This ordinance may be amended or repealed at any time by the Common Council. Unless so amended or repealed it shall remain in force for one year."

As this was repealable at will, it did not conflict in any degree with the constitutional provision, and was in express conformity with it.

(4) The Chancery suit in the name of the City of Detroit in the Wayne County Circuit Court, in June 1919, (bill of complaint p. 48) is without significance in this inquiry. An examination of the bill in that case will show that it was framed *to enforce franchise rights* only on the so-called Pingree lines. The plaintiff has no franchise rights on Fort Street or Woodward Avenue,

south of Milwaukee (the parts referred to in this bill). The institution of that suit has no bearing as to those streets because it did not attempt to recognize or enforce any rights except upon those streets or portions of streets, whereon franchise rights existed. Moreover the decree in that cause provided:

"This order in no manner affects or is intended to affect any fundamental rights or contractual rights of the parties in and to the streets of the City of Detroit as they exist at the present time, the intention being simply by the making of this order to provide for the rate of fare in which cars will be operated at present and is to be considered only as a temporary solution of the problem before the court."

Such temporary arrangements do not affect fundamental rights; say both the Supreme Courts of the United States and Michigan.

Detroit vs. D. U. R., 107 Mich. 320, 321;

Detroit United Railway vs. Michigan, 242 U. S. 253-4.

(5) *The other acts and resolutions depended upon* are stated only in the most general terms in the bill (R. pp. 6, 7). The simplest rules of pleading require that if any dependence is placed upon the terms of such resolutions, such terms (at least the important parts thereof) shall be stated.

But not only did the plaintiff fail to state the substance of any such acts or resolutions, but it positively refused to incorporate a sample of them in the record before the Court below (R. p. 65).

The Court would necessarily imply that they were ordinary police regulations such as a resolution reciting

the dangerous conditions of tracks and pavements and an order to correct—and similar resolutions of like character.

In the absence of plaintiffs stating explicitly the language on which it relies, as confirming new rights, such vague allegations will be disregarded.

(6) *Expenditures*—

It is further alleged in plaintiff's bill that plaintiff has expended large sums on Fort Street and Woodward Avenue, since the expiration of the franchises

"with the knowledge, acquiescence, and either tacit or express approval of said City and its officials (R. p. 6).

and therefore the City, having stood by and observed these expenditures, and reaped the benefits, plaintiff has acquired permanent rights by acquiescence and estoppel (R. pp. 6, 7, 8).

The Alleged New Franchise Rights in Fort Street and Woodward Avenue:

Having thus stated, as we believe fairly, the substance of the plaintiff's alleged grounds for the acquisition of new and continuing rights in Fort Street and Woodward Avenue, since the Fort Street decree, let us ascertain whether they have any foundation in law or fact.

These so-called new rights are all based in the bill upon the acts or omissions of the Common Council or other officials of the City of Detroit. It is demanded by the plaintiff that they be declared to be continuing rights, contrary to their express terms and in repudiation of plaintiff's most solemn engagements.

A Decisive Answer.

We submit there is one decisive answer to all these claims of alleged new right, one outstanding fact that deprives each and every one of them of any force whatsoever. These claims, we submit, are all swept aside by the simple statement that even if the Common Council and every officer of the City of Detroit had united in one express act or ordinance, not reserving any rights in the City, but explicitly conferring upon the plaintiff the very rights which it would now have raised by implication, or which it would have the Court infer from such ambiguous and indefinite acts and resolutions, it would have been utterly void and of no effect.

The reason is, that the Constitution of Michigan, adopted in 1908, provides that no City or Village shall grant any public utility franchise, which is not subject to *revocation at the will of the City or Village*, except upon a vote of three-fifths of the electors (quoted fully, *Supra*, p. 7).

It would seem unnecessary to argue such a proposition as is now presented in face of this striking and decisive language.

In the Fort Street case it made substantially the same claims, based upon the alleged necessities of the people for its service. It alleged that the transportation system of Detroit would be broken down and its industries paralyzed without its continued service, and that, therefore, by public necessity, it was under a bounden duty to continue to serve, and, therefore, it had a right to serve until some new provision was made. But the Supreme Court of Michigan held directly the contrary (See *Ante* pp. 3-5).

The Railway Co. alleged then, as it says now, that it had a duty to the public to continue to operate—but only at a price and a profit.

Other people abide by their undertakings even if it results in bankruptcy, but not so this institution, it must have at all times a profit. It demands in this bill of complaint a high standard of morals for the City and its officials. The City must not even drive a sharp bargain in purchasing D. U. R. property—but the D. U. R. may refuse to run, to keep its word, if it will lose any money thereby.

It denounces with vituperation and abuse the city officials for their alleged attempts to retake the City's own, as an attempt to purchase something below value, but it may break its agreements on the plea of necessity, and would even demand practically permanent rights in the streets of Detroit, against its own written plighted word not to make any such claims.

It is fortunate that the whole people of the State of Michigan were wise enough to put up a Constitutional bar, which prevents the seizure of those continuing rights on account of the acts or omissions of the representatives of the people. Only a three-fifth vote of the electors can confer such rights.

The Denver Water Case:

But it is argued that the Denver Water case is a precedent governing this case (246 U. S. 178).

If the Court in the Denver Water case had held that the ordinance in that case conferred the rights declared

by the decision, in spite of a constitutional provision, such as that of Michigan in this case, it would have called for nice discriminations between the acts of the Common Council in that case and this, which could be readily pointed out, but no constitutional provision was before the court in that case. The Common Council of Denver had full right to grant a franchise to the Water Company, so far as the case shows. In that case the Court held that the Common Council of Denver had granted a new franchise to the Water Company by express words.

The court said:

"The alternative which we adopt is to construe the ordinance as the grant of a new franchise of indefinite duration. • • •"

It is not necessary for us to distinguish this case (which could be readily done for a number of pertinent reasons,) because the court had no constitutional provision before it forbidding the Common Council to grant any such franchise.

In our brief, submitted to this court on the motion to dismiss or affirm, we said, referring to the Denver case (our brief pages 20, 21):

"In the Denver case, 246 U. S. p. 178, relied on in the court below, by plaintiff's counsel, the Common Council had full power to grant rights in the streets to the Water Company and the Court held that it had actually, under the terms of the grant, done so. There was no constitutional provision against such action as in this case. In the present case, if the Common Council had tried to do so, expressly, it would have been void. Certainly it could not accomplish any more in that direction

when it was not trying to do anything or confer any rights than if it had explicitly undertaken to confer such rights."

Judge of our surprise on receiving the brief of plaintiff's counsel in opposition to our motion to dismiss, to read the following (their brief, p. 11):

"The Colorado Constitution contained Article 20, Section 4, relating to the City and County of Denver, (1 Mills Statutes, Colo. p. C-277), the provision that: 'No franchise relating to any street, alley or public place of the said City and County, shall be granted except upon vote of qualified tax-paying electors' * * * In this Denver case it was the ordinance of the Council which was held to give a franchise right of indefinite duration, *notwithstanding the constitutional inhibition upon franchises granted otherwise than by popular vote.*" (Italics—theirs)

Astounded at this statement, we searched the Colorado laws and found there was a provision applying to the City and County of Denver. We then turned again to the opinion of this Court in that case (246 U. S. 178) and found no reference whatever to any Constitutional provision. We then corresponded with the attorneys in the case, two of whom advised us that no reference had been made to the Constitutional provision either in the briefs in that case or on the arguments.

We, therefore, believe that we are warranted in saying that the Denver decision was rendered in a case where no claim was made but what the Common Council had full power to make a franchise grant and that it is not, in any degree whatever, a precedent in this case.

Further research has called to our attention that in the earlier case of *Denver vs. New York Trust Company*, 229 U. S. 123, the Court, in the course of a twenty page opinion, did refer to that Colorado constitutional provision, but it is not mentioned in the head-notes of the case. It is also noticeable that none of the attorneys in the earlier case (argued in 1912) was engaged on either side in the second case, five years later.

The Constitution is a Bar:

We submit the Constitution of Michigan prohibits in the most explicit possible terms the Common Council or other officials of Detroit, from granting either by positive act or by omission or by any indirection whatsoever, such a franchise as is now claimed by the plaintiff and made the basis of this suit. It would seem that authorities are unnecessary but nevertheless, we appeal, strikingly enough, to this very same first *Denver Water case*, and from the opinion in that case by Mr. Justice Van-Devanter, quote as follows (229 U. S. 139-40):

"Besides article 20, Section 4, of the State Constitution, then in force, provided that no franchise relating to the streets of the City should be granted except upon a vote of the electors and article 9 of the City Charter then in force made a like vote and prerequisite to the acquisition of the City of any public utility. So, had the Council attempted by the ordinance of 1907, to make an election to purchase or to renew (the franchise) the attempt would have gone for nothing."

Thus, we find this court, in a like case, has explicitly declared to be sound the very doctrine we stand upon, that, as the Common Council could not directly or affirm-

atively give such rights in the streets, no ambiguous acts on its part or omissions could be construed as having such effect.

The city authorities having no power to grant directly rights in the streets except those revocable at will, cannot do so by indirection. Having no power to grant the same by express act, none such may be implied.

Eaton vs. Shiawassee Co., 218 Fed., 588;

Litchfield vs. Ballow, 114 U. S., 190, 193;

Hedger vs. Drdon Co., 150 U. S., 182;

Niles Water Works vs. Niles, 59 Mich., 311;

Detroit vs. Robinson, 38 Mich., 108;

Spitzer vs. Blanchard, 82 Mich., 246, 248;

McCurdy vs. Shiawassee Co., 154 Mich., 550.

In *Eaton vs. Shiawassee*, *supra*, the county had borrowed and used the money for a county building, but without a vote of the people as required by the constitution. Held that defendant could not recover directly or indirectly on the bonds or for money loaned or money had and received. "Until the vote of approval is given, the county is as much without power as if the electors had no right to confer it."

In *Litchfield vs. Ballow*, *supra*, Mr. Justice Miller on this point said:

"If this provision is worth anything it is as effectual against the implied as the expressed promise and is as binding in a court of chancery as a court of law."

In *Spitzer vs. Blanchard*, *supra*, the Supreme Court of Michigan said:

"There can be no implied liability of a village where there can be no binding expressed contract."

In *Detroit vs. Robinson*, *supra*, the court said:

"The City cannot be held liable for work done for its benefit as upon an implied contract, for the law will not imply a promise as against the City where it could not make an express contract."

In *McCurdy vs. Shiawassee County*, *supra*, the Supreme Court of Michigan said:

"All persons dealing with counties are bound to ascertain the limits of their authority fixed by statute or organic law and are chargeable with knowledge of such limits. 11 Cyc. 468 and cases cited. This Court has held that the doctrine of implied liability has no application in cases where the liability can only be created in a certain way. 56 Mich. 95."

As To Estoppel:

But it is argued in the brief for appellant, page 62, that the city is estopped by the acts and omissions of the Common Council and officials, set out in the bill, to deny plaintiff's continuing rights in the streets and reliance for this contention is placed upon

City Railway vs. Citizens Street Railway, 166 U. S. 567;

Essex vs. N. E. Telegraph Company, 239 U. S. 313;

But those cases have no application where there is a constitutional provision forbidding the Common Council to exercise any such power or make any such grant. They are only applicable where the Common Council had the authority originally to make the grant which the Court held the city was estopped to deny. This, we think, is fundamental and disposes of all arguments

based upon estoppel, not only in the "Brief for Appellant" but in the brief of former Justice Hughes, filed upon the motions in this cause (pp. 11, 13, 14).

In both of the cases relied upon by appellant's counsel (Essex and City Ry. *supra*) the Common Council had full power to make the grants in question.

In the *Essex case* the exact waiver involved was the waiver of the right of the town authorities to impose certain restrictions and regulations upon a telegraph company exercising a right under congressional authority to place wires and poles in the streets of the town. The Court said (p. 320):

"A city may not arbitrarily exclude the wires and poles of a telegraph company from its streets but may impose reasonable restrictions and regulations."

In the *City Railway case*, *supra*, the Common Council, had by ordinance attempted to extend the franchise for seven years and the Court said the ordinance "was attacked principally upon the ground of a want of consideration for the extension of the franchise for seven years." No question was raised whatever about the constitutional power of the Council to make the grant and the Court held that the company, having placed a new loan in the market upon the faith of this extension, the city was estopped and the Court in that connection said:

"All that is necessary to create an estoppel *in pais* is to show that upon the faith of a certain action on the part of the city, *which it had power to take*, the company incurred a new liability."

The distinction is recognized by all of the authorities between an estoppel as to action within the power of a

municipal corporation and estoppel with respect to ultra vires acts.

7th L. R. A., 1248, and notes.

L. R. A. 1915-A, 994.

Parkersberg vs. Brown, 106 U. S. 487, 501.

Dickson County vs. Field, 111 U. S. 83, 92.

Lake County vs. Graham, 130 U. S. 674, 683.

Eddy Co. vs. Crown Point, 3 L. R. A. N. S. 684, 689.

State vs. Murphy, 134 Mo. 548.

Cole vs. Cedar Rapids, 118 Iowa 334.

In *Lake County vs. Graham*, 130 U. S. p. 683, the Court said:

“ * * * In this case the standard of validity is created by the Constitution. * * * These being exactions of the Constitution itself, it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.”

The sole purpose of the constitutional provision requiring a vote of the people was to take away all power of the officials or representatives to bind the municipality, because of a long history of scandals and corruption. If they may do it by omissions or ambiguous acts, then the Constitution is set at naught.

Where a vote of the people is required as a condition to the validity of a grant, any such grant, formal or informal, without the vote is void and no estoppel can be raised against the municipality either by lapse of time or receipt of benefits or any negotiation whatsoever.

Hagerman vs. Hagerman, L. R. A. 1915-A 904.

Eaton vs. Shiawassee Co., 218 Fed. (6th C. C. A.) 588.

Salt Creek Township vs. King Iron Co., 51 Kan. 520.

Wormstead vs. Lynn, 184 Mass. 425.

Daniels vs. Long, 111 Mich. 562.

Smith vs. Newberg, 77 N. Y. 136.

Lynchberg vs. Person County, 109 N. C. 159.

Defiance vs. Defiance, 13-23. Ohio C. C. 96.

State vs. Pullman, 23 Wash. 583.

Note to L. R. A. 1915-A, page 998.

"Hagerman vs. Hagerman, supra, holds that where by statute a municipal corporation is prohibited from entering into a contract for the acquirement of a waterworks system for domestic purposes without first holding an election, and securing a favorable vote of the electors on the question, *a contract of this character entered into without such election is absolutely void, and the receipt by the corporation of benefits thereunder does not operate to estop it to assert the invalidity.*

Salt Creek Twp. vs. King Iron Bridge & Mfg. Co., 51 Kan. 520, holds where a contract by a township officer for the construction of a bridge is void under a statute defining how bridges shall be built and paid for, and which was not complied with in that the proposition to build the bridge did not carry by the necessary majority, *the acceptance of the bridge by the officers, and its use by the public, do not estop the township to assert the invalidity of the contract.*

Wormstead vs. Lynn, 184 Mass. 425, holds that a city or town, by practice or custom, may not authorize an officer to make contracts in its

behalf, and may not by such practice or custom be estopped to deny his authority in this regard, where no one is authorized to make such contracts until a vote of the city or town has been passed authorizing the same.

Daniels vs. Long, 111 Mich. 562, holds no estoppel arises to assert the invalidity of a contract for waterworks as against a contractor having knowledge of the invalidity at the time of executing the contract. In this case the contract was invalid because not carried by a two-thirds vote of the voters residing in the municipality.

Smith vs. Newburgh, 77 N. Y. 136, holds an absolute exercise of authority by officers of a corporation in violation of law cannot be upheld, and where officers of such a body fail to pursue the strict requirements of the statute delegating the power exercised, the corporation is not bound, and a person dealing with it is obliged to see that such provisions have been fully complied with. (Failure to submit question to a vote of the electorate.)

Lynchburg & D. R. Co. vs. Person County 109 N. C. 159, holds that where the only authority that can fasten upon a township an obligation to pay a subscription to stock in a railroad company is a duly ascertained vote of the majority of its qualified voters, without such vote any action of the county commissioners or township justices in appointing agents to subscribe for or represent each vote of said township in the stockholders' meetings is a nullity and ultra vires, and cannot operate to estop the municipality.

Defiance vs. Defiance, 13-23 Ohio C. C. 96, holds that where a contract by a city to pay hydrant

rentals is invalid because the council did not comply with the statute requiring a vote ratifying the contract, no action by the council in recognition of the contract or payment of rental thereunder can estop the municipality from asserting the invalidity of the contract, since where the council by its direct action cannot bind the city, it cannot do so by any indirect action.

State vs. Pullman, 23 Wash. 583, holds that courts only estop municipalities from interposing a plea of ultra vires and from escaping the responsibility of their acts where there has been a defect in the execution of the contract within the power of the municipality to make, and not where, because the matter has not been submitted to a vote as required by law, there has been absolute want of power upon the part of the municipality to contract."

Estoppel by Inaction of the People:

In the "Brief for Appellant," at pages 57 to 61, inclusive, it is argued that such a franchise as this

"may be created either by consent or grant of the municipal officials, or in the absence of such grant, may be created by the acquiescence of the people of the municipality in the improvement and continued operation of such tracks, pursuant to the direction and consent of the municipal officials. As a municipality may be estopped through action or acquiescence of its officials, in a matter over which they have power, so in a matter over which the people have power, it may be estopped by the people's acquiescence in a tacit approval of action

taken under the direction of the municipal officials" (brief p. 57).
and

"Those expenditures were made in part under the explicit direction and in all cases with the permission of the principal municipal officers. The public knew of these things and tacitly approved them and have enjoyed the benefits for some seven years after the time when by the Fort Street decree the City's power of ouster was made legally effective" (brief p. 61).

Thus it seems a grant of a franchise by *estoppel on account of inaction by the people themselves* is somewhat modestly and diffidently claimed in that brief. No such proposition of law is advanced or countenanced in the other brief (Brief of former Justice Hughes).

No authority is given for any such new and startling doctrine, no precedent or analogous case. We do not know how seriously this claim is presented, since no argument or authority is presented for it.

If such new doctrine is to be made the law, it will leave the people helpless indeed; for they have done all they can do in their organized capacity, to prevent the seizure of the streets.

Would it be held that the people must proceed by mob law to take the matter in their own hands. They have solemnly warned the railway company "you can get no rights in our streets except by three-fifths vote of the people at an election," and the Railroad Company knew this and deliberately agreed to it, in making any expenditures or other moves, for these were all done under day to day agreements.

These expenditures were made from time to time under most solemn engagements that no rights in the streets should be claimed thereby; and all the time the revenues were flowing in upon them, and they were paying handsome dividends and rolling up surpluses. The Railway authorities knew the Constitutional limitations and with utmost deliberation took their chances. They knew that the property as such remained theirs and that in all human probability the City would want to keep the property when ready to operate itself, and would pay for it, because of the decisions of this court, holding that they were entitled to be paid for it or remove it.

What is the contention of the other side upon this question?

Must the people decide for themselves that no agreement which the railway made was binding upon it, and that the people must take up arms against their own representatives as well as the Railway Company, and go blindly ahead and smash the whole works.

Such is the logic of this "Brief for Appellant". (Is this logic repudiated by the silence of the other brief?).

The logic is not sound. This is a republic, not a democracy. Public action is taken through representatives duly chosen, whose acts are subject to well defined constitutional limitations which must be observed. They are known to all parties, and all dealings with the public are held with full knowledge.

This Company made no move except in view of those limitations (to say nothing of the expressed agreements) and it took good care to calculate the revenues and the costs.

The first element of estoppel is lacking because the Railway Company took no action except with eyes wide open and did nothing on the faith of any action or representation of the people.

Crane vs. Reeder, 25 Mich., 303;

Fletcher vs. Judge, 81 Mich., 186;

2 Pom. Eq. (4th Ed.) Sec. 805.

But rules of law established for centuries, seem to cut no figure with the counsel for plaintiff, for they ask you to ignore or override the following:

1. It has been a rule for many years that people must abide by their agreements, even street railways.
2. It has been a rule that there can be no estoppel against the people by reason of acts or omissions of their representatives where those representatives have no power to act.
3. It has been a rule that there can be no estoppel against the public by reason of their own inaction.
4. It has been a rule that there is no estoppel where the person claiming the estoppel acted with full knowledge.
5. It has been a rule that there can be no estoppel in favor of one who has taken no action on the faith of any act or misrepresentation by the opposite party.

We invoke these rules. They are sound and meritorious.

Moreover the cases cited and quoted above are direct authorities against this position of *some* of plaintiff's counsel.

See cases ante pages 46-49.

A Refined Distinction About the Kind of Franchise:

In the "Brief for Appellant" (page 57) it is attempted to refine away the constitutional limitation on granting of franchises by calling this "a right in the nature of a franchise." It is said:

"It is our position that although under the Michigan Constitution a popular vote is necessary to validate the grant of a *term* franchise (Italics theirs), a right in the nature of a franchise to continue the use of tracks until their discontinuance shall be consistent with public interest, may be created by consent or grant of municipal officials, etc."

The Constitution says nothing about a *term* franchise. It says *any* franchise.

The claim of the plaintiff to these certain new rights is based entirely upon the decision in the second *Denver Water case*, and the right which it claims is precisely the right held to have been conferred by the ordinance of the Common Council in that case, and which was defined by the learned Justice who wrote the opinion, as follows:

"The alternative which we adopt is to construe the ordinance as *the grant of a new franchise of indefinite duration* * * *, terminable either by the city or the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver."

This is the kind of a franchise, which plaintiff claims, by its bill of complaint (Rec. p. 8) and throughout its brief, has been conferred upon it by the acts, agreements and resolutions set forth in the bill. It was held, in that

Denver case, to be an affirmative grant by an ordinance enacted by the common council.

Clearly it was not a "franchise revocable at the will" of the grantor. It was revocable only when such action comported with the needs of the citizens for water service. This might run for years and could not be argued to be one terminable at the will of the maker.

"Revocable at Will."

A franchise revocable at the will of the grantor could be revoked at any time with or without reason, and without reference to the interests of the people, and if need be, against their interests and positively without any inquiry as to such interests.

Under the Fort Street decisions of the Supreme Court of Michigan and of this Court, the city had the right to give notice any day to remove from the street, without any reference to whether it was in the public interest, or whether it would be an injury to the public.

But now the counsel for plaintiff say that, by these acts and omissions of the common council, the city has lost this right, and the company has a right to stay in the street continuously until the "public interest" justifies its removal.

Such, beyond any doubt, is not, then, a "franchise revocable at will," which is called for by the constitutional provision.

Greenwood vs. Freight Company, 105 U. S., p. 13;

Bridge Co. vs. U. S., 105 U. S., 470;

Hamilton Gas Light Company vs. Hamilton, 146 U. S. 258;

Calder vs. Michigan, 218 U. S., 591.

Peck vs. D. U. R., 180 Mich. 343, 347-8.

In *Greenwood vs. Freight Company*, 105 U. S. *Supra*, the Court was considering the right of repeal of a corporate charter under a Massachusetts Statute providing that every act of incorporation should be subject to repeal "*at the pleasure of the legislature.*" The Court said:

"It would be difficult to supply language more comprehensive or expressive than this * * * all this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend upon the necessity for it or on the soundness of the reasons which permitted it. This expression 'the pleasure of the legislature' is significant * * *"

In *Bridge Co. vs. United States*, *Supra*, the court said:

"Congress reserves the right to withdraw the assent hereby given * * * The withdrawal of assent has been left to depend upon the judgment of Congress in the exercise of its discretion. * * * What the company got from Congress was the grant of a franchise expressly made defeasible at will to maintain a bridge across one of the great highways of Commerce. This franchise was a species of property but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant. * * * A withdrawal of the Franchise might render property acquired on the faith of it less valuable but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give * * *"

In *Hamilton Gas Light Company vs. Hamilton, supra*, the Court hold the power of repeal to be arbitrary and say:

"These views are supported by the decisions of this court (citing the *Greenwood case, supra*). The words 'at the pleasure of the legislature' are not in the clauses of the Constitution of Ohio or in the Statutes to which we have referred, but the general reservation of the power to alter or repeal a grant of special privileges necessarily implies that the power may be exercised at the pleasure of the legislature" (270, 271).

In *Calder vs. Michigan, supra*, it was alleged that the Mayor and city authorities carried out an unfair scheme for getting the repeal hurried through the legislature without notice to the company. The court held the power to be absolute and said:

"We do not inquire into the knowledge, intelligence, methods or motives of the Legislature, if the repeal was passed in due form" (pp. 598, 599).

Peck vs. D. U. R., 180 Mich., 343, 347-8. In this case one of the day to day agreements was before the court for construction. The Court said:

"What is the grant in question? The most that can be claimed for it is that it is a revocable right. It is immaterial whether it is termed a grant, license, franchise or permit. Its important feature in this discussion is that whatever it is termed it is revocable at the will of the City, whenever the public interest requires its termination. *By its terms this is to be determined by the common council or people of Detroit at their pleasure or caprice.* * * * *This power can be exer-*

cised without complying with any conditions. It can be exercised at the will of the Common Council or the City and is independent of any other condition."

(The italicized portions above are omitted from the quotation from this case made by counsel for plaintiff, in their brief at page 58.)

These cases establish that "at will" means with or without reason, for whim or caprice, for good or ill, for the benefit of the people or for their detriment.

But it is now claimed by counsel that we can do it only when it is for the peoples benefit, of which somebody else must be the judge besides ourselves.

If this be true, then it is a franchise which has been granted in defiance of the words of the Constitution, which call for one revocable at the will of the grantor.

We shall not enter into any prolonged discussion or examination of the authorities about what is a franchise. The language of the Constitution is very broad, and says "any franchise." The right claimed by the appellant here is declared by the Supreme Court of the United States itself to be a franchise, and it, beyond any dispute, is not a franchise revocable at will. Therefore, it conflicts with the plain constitutional provision.

About an Implied Franchise:

In the brief of Mr. Hughes (pp. 12, 14) he very subtly attempts in various places to inculcate the idea that this claimed franchise is a franchise *by implication* and not by direct grant.

Distinguished counsel undoubtedly thereby attempts to get away from the plain language of the Constitution, which forbids "any franchise," and he seeks to establish a new kind of a franchise, namely, one raised by implication from the necessities of the case, and to ask this Court to hold that it is not such a franchise as was within the purview of the words of the Constitution.

Thus is an attempt made to take away from the people, by subtle reasoning, the very rights which they sought to preserve by the words of the constitution, "*any franchise*."

These implied franchises are the most dangerous kind, the most elusive, and the most difficult to deal with. You know what an express franchise means, but an implied franchise easily escapes when you seek to lay hold of it.

But there is no warrant for this reasoning of an implied franchise. The decision in the *Denver case* holds it to be an express franchise, not an implied one (246 U. S., 190). It arose from express grant, namely, an ordinance defining the rights of the parties.

Moreover, the Supreme Court of Michigan in the Fort Street decision has itself declared that *there is no implied franchise arising from the necessities of the people* for this service; and we take it that this Court would hold itself bound by the decision of the Supreme Court of Michigan upon that subject, especially as this Court affirmed that decision of the Supreme Court of Michigan.

We have but to go back to the original decision in the Fort Street case. In that case the counsel argued exactly what they argue in this case, that the public interests demanded the continuation of this service and that they were in duty bound to perform the service until the

public provided some other means, and that a corresponding right was thereby created by implication of law in the railway company. This reasoning was explicitly repudiated by the Supreme Court of Michigan (See this brief ante pp. 3-5).

It is curious and somewhat amusing to note the conflicting claims in the briefs of counsel. In the brief of the distinguished former Justice it is claimed that this is a franchise by implication of law. No such claim is made in the brief of the other counsel, who were in the former D. U. R. case, and who know that such claim has been repudiated by courts in suits between these same parties, and who are well aware that the Denver case itself declares the alleged franchise to be an express franchise.

On the other hand, the brief of Mr. Stevenson claims that the inaction of the people themselves creates a new franchise by estoppel (See Brief at pp. 57, 61). But no such claim is made in the brief of Mr. Hughes.

There is a silent conflict between these briefs that is more eloquent than words.

C.

The third ground urged by plaintiff for equitable relief is (B. p. 37):

The proposition to acquire a street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

Summarized, plaintiff's objections under this paragraph are that the election and ordinance are void because of:

(1) Misrepresentation to the electors, in the message of the Mayor to the Common Council; in the map issued by the Board of Street Railway Commissioners and in public speeches by officials and newspaper articles.

(2) Misunderstanding of the proposition by the electors, and

(3) That an exact copy of the ordinance was not printed on the ballot.

What misrepresentation or misunderstanding existed?

It is very hard to comprehend the involved and complicated reasoning of the plaintiff's bill on this subject (See R. pp. 11-21) and if it is not understandable that fact ought to be sufficient reason for dismissing such a claim because to overturn an election—a decisive election on an important matter—should require very clear and explicit reasons.

It is well in the first place to note that the proposition submitted provides for just two things, first, the approval of the proposition by the electors to acquire municipal lines on certain streets and second the voting of bonds for \$15,000,000 for the project.

Nothing else is in the proposition submitted—and the ordinance itself was published as required by law.

All of the complaints of counsel for plaintiff about misrepresentation of the proposition and of the misunderstandings by electors consist of extraneous alleged facts entirely outside of the proposition.

They allege that the Mayor and others represented that it was not intended to *construct* on Fort Street and Woodward Avenue and certain day-to-day lines but to take over those parts of the plaintiff's lines *by purchase*, whereas the proposition did not so provide. A consideration of the message of the Mayor to the Common Council (R. pp. 51-2-3) conclusively shows that the plan was in no sense dependent upon a purchase of these lines. His message clearly recognizes that purchase is merely considered possible. He does not claim that this purchase can be consummated without a further approval by the electors.

The ordinance and proposition only provide for the *acquisition* of a street railway on the routes described (Ordinance, R. pp. 27-41). They say *nothing* about any purchase of plaintiff's lines on certain of those streets. But it is shown, says plaintiff, that the Mayor and other officials stated to the people orally and in writing that it was a part of the plan of procedure under the ordinance and vote to purchase these lines from the plaintiff. They led the people to believe (say plaintiff's counsel) that the ordinance and proposition author-

ized that method which was not true, hence the election must be set aside.

The learned judge below on this point says:

"It is urged that the voters were deceived through oral and written statements of public officials into a misunderstanding of this ordinance. It was correctly published according to law. I hold that those acts complained of were unofficial acts and that they have no more bearing upon this legal proposition than they would if said by some private citizen or one of the papers in this city.

"I hold that this Court cannot inquire into the things that influenced the voters and as far as I can go in that direction is to inquire whether or not the ballot on which this question was submitted was a proper ballot. As to the things done in the campaign by private individuals or public individuals, that is outside of the scope of proper investigation of this Court.

"The form of the ballot and whether the question was submitted by a proper ballot and in a proper manner to the voters is a judicial question. It is not necessary under the law that the entire ordinance be on the ballot but that it be fairly described and identified with the ordinance which has been published in such a way that the public may know what it is that they are voting on and I hold that this ballot does properly submit that question to the voters of the City and did so submit it."

Ballot requirements:

A reading of the ballot whose language was prescribed fully in Section 2 of the ordinance (R. p. 34) shows that the proposition was fully described and with precise elaboration and that nobody could misunderstand it. Not only so but the ordinance was published and the proposition on the ballot might well and lawfully have been in much shorter and more compact shape, but great care was taken to make the ballot full and clear.

The authorities are explicit and uniform that all that is necessary to be put upon the ballot is a clear identification of the proposed law or ordinance to be voted upon and sufficient to show its character and purpose.

State vs. Winnett, 10 L. R. A. (N. S.) 149.

Kreman vs. Portland, 57 Ore. 454.

Washington vs. Dency, 4 Wash. 135.

State vs. Longworthy, 55 Ore. 303.

Olivers vs. Lainsville, (Ky) 217 S. W. 907.

Burton vs. Detroit, 190 Mich. 195, 203.

In *Burton vs. City of Detroit*, 190 Mich. 195, 203, the question arose as to the sufficiency of the form of submission. A proposed charter amendment, giving authority to the common council to fix the salaries of certain officials of the City, was to be submitted. The amendment itself was not printed upon the ballot and the form of submission was of the most general character. This was the language:

"Do you favor authorizing the Common Council to fix the compensation of certain elective and appointive officers of the City of Detroit, within

certain limitations; also to fix the compensation of the subordinates to such officials?

Yes

No."

The Court said:

"We are of the opinion that the form of the ballot was sufficient to fairly apprise the electors of the purpose and effect of the proposed amendment."

In the present case the entire proposition was printed upon the ballot in utmost detail and the *only* complaint is that it did not include an absolute specific direction to *construct* instead of general authorization to *acquire*.

The word "acquire" is used in the constitutional provisions cited; also in the statutory and charter provisions and throughout the ordinance and proposition. A construction of the ordinance or proposition can reach no other result than that a plan of acquisition is contemplated. The word "acquire" as thus used, comprehends the right to both purchase and construct, either or both. It was so held in an analogous case including the municipal ownership of a lighting plant.

Clark vs. Los Angeles, 160 Calif. 48.

Anchor Investment Co. vs. Columbia Electric Co., 61 Minn. 510.

It was entirely competent and proper to submit the proposition as one to *acquire* a system, thus leaving to the Common Council and officials the alternative methods of purchasing or constructing upon those few streets where lines already existed. Any other course would have been unwise. And if the direction on the ballot had been rigid, compelling the authorities to *construct* only, it would have been destructive of plain-

tiff's property, and the plaintiff would have been the first to complain.

The course taken was lawful and competent under the authorities.

Sioux Falls vs. Farmers' Loan & Trust Company, 136 Fed. 721, 732.

State vs. Allen, 178 Mo. 555.

State vs. Gordon, 223 Mo. 1, 2, 17, 20.

In *Sioux Falls vs. Farmers' Loan & Trust Company*, supra, the Court said: (Van Devanter, Circuit Judge, being a member of the Court)

"The question was submitted in the exact language of the statutes, and the sole proposition submitted to be voted upon was whether or not the city should issue bonds to the amount of \$210,000 for the purpose of providing water for domestic use. Nothing is said in the statute about submitting to the electors the proposition whether the city shall construct or purchase a system of waterworks. That was a matter to be determined by the city council, under the powers conferred upon it, and with which the electors had nothing to do."

In *State vs. Allen*, supra, the proposition submitted was in effect the issuing of bonds "for the purpose of constructing, maintaining, and operating or purchasing an electric light plant." It was contended that there were submitted to the vote of the people two propositions, one to increase the debt for the purpose of constructing, and another for purchasing an electric light plant already in the town. The court, however, in distinguishing a Washington State case, said:

"There is a marked distinction between that case and the one at bar, in this:—in that case

there were clearly two distinct propositions, having different objects in view, *while in the case at hand, the proposition submitted to the voter, was to increase the bonded indebtedness of the town to purchase or erect an electric light plant.* The same end was—intended to be accomplished, but in two different ways, to be determined upon by the board of trustees in the exercise of their discretion. The proposition submitted to the voters was the exact proposition that they were called upon to decide, and in a way that could not mislead any one, and *while it is in all probability true that some of the voters might have wished to vote for the erection of the plant, and others to purchase a plant already erected, and they did not have the chance to express their views in this regard, we do not think that such fact invalidates the election that was held, or the bonds that were issued by the town in pursuance thereof."*

Misrepresentations to electors:

But it is said that the Mayor in his speeches misrepresented the effect of the proposition by leading the people to suppose that the method of purchase of existing lines on Fort Street and Woodward Ave. was planned, and that the people supposed the proposition was committed to that course. (This is not correct as shown hereinafter.)

If an election is to be set aside because public speakers, officials or newspapers make erroneous statements about the question presented, or the meaning of the language in the proposition or matter to be decided

for the questions presented, then no election would stand.

In fact, in this case the Proposition was debated from every angle by the organs of public opinion and from scores of platforms. The points now being made were made before election, and the voters had before them all views of the matter (R. pp. 11, 12, 14).

But as a matter of law, courts have no jurisdiction, we submit, to try the question as to what statements influence voters.

The voters in this instance were *quasi-legislators* and no rule is better settled than the one that Courts will not and can not determine what motives or reasons influenced them in voting as they did, or upon what information or arguments they acted.

Angle vs. Chicago Ry., 151 U. S. 1, 18-19.

New Orleans vs. Warner, 175 U. S. 120.

McCray vs. U. S., 195 U. S. 37, 54-56.

Chesapeake vs. Manning, 186, U. S. 245.

People vs. Gardner, 143 Mich. 104.

Soon Hing vs. Crowley, 113 U. S. 710.

People vs. Calder, 153 Mich. 724.

Allen vs. State, 44 L. R. A. (N. S.) 468, 469.

Epping vs. City of Columbus, 117 Ga. 263, 285.

In *Allen vs. State*, 44 L. R. A. (N. S.) 468, 469, the Court said:

"If the measure as it is now contended, was to be submitted to the voters at the wrong election, or if, as it is now urged, it was impossible to give the measure the publicity required, the courts were open to any citizen, and possessed the power, upon a proper showing, to confine the adminis-

trative acts of officers within the law. Timely appeal to the courts upon the question now raised, if meritorious, would have settled the matter before the election was had. However, the measure was submitted to the voters without question. They were invited to believe that the formalities of the law pertaining to the submission of the measure had been fully met. The expense of the election was incurred, and the electors, imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through a mere hollow form, we may assume, investigated the question, and went to the polls and voted thereon."

In *Angle vs. Chicago, St. Paul, etc., Railway*, 151 U. S. Rep. page 1, the court said, at page 18:

"The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislature, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly."

In *Chesapeake & Potomac Tel. Co. vs. Manning*, 186 U. S. Rep., p. 238, at 245:

"But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such

knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

Judge Cooley in F. & F. Company vs. Woodhull, 25 Mich. 99, 102, 107, said:

"The legislature will not only choose its own modes of collecting information to guide its legislative discretion, but, from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results. And if the records show no investigation, we must still presume the proper information was obtained; for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances when acting within the limits of its authority.

• • • • • • •

"It is not consistent with legislative independence and dignity, that the courts should assert a right to sit in judgment upon legislative action, or to attribute to the legislature erroneous or oppressive conduct in the exercise of any of its proper and legitimate functions. *These two departments of the government being co-ordinate, and neither of them occupying a position subordinate to the other, the conclusions of each must be accepted by the other as proceeding from good motives, and as warranted by the proper*

*information. * * ** It is, therefore, in the highest degree impertinent and obtrusive, when either department undertakes to advise the other, that in the exercise of its proper functions, it had acted *unwisely and indiscreetly; has misjudged the facts or perverted the law, and its action must be still more offensive, if it entertains the appeal of parties from the decisions of the other, when acting within a province which was set apart to be peculiarly under its jurisdiction and control. Moreover, there is in the nature of the case, and the difference in the manner in which legislative and judicial functions are performed, reason sufficient to demonstrate the impossibility of a proper review by the one department of the decisions the other has made. Legislators have a right to act upon their own knowledge and observation, upon hearsay, upon information derived from the public press, upon the ex parte petitions of interested parties, upon anything in short, which satisfies their judgment; and public opinion is one of the most important facts to be considered in determining upon the propriety or advisability of a proposed law. Even an unreasonable prejudice, if general or widespread, may sometimes very properly be a controlling consideration, when the case is such that to the enforcement of the law, a strong supporting public sentiment would be a necessity. But these are things the courts must not allow to influence their action."*

In *New Orleans vs. Warner*, 175 U. S. 120, 145, the court said:

"It may be that the action of the common council was dictated by improper considerations,

though this is rather hinted at than asserted; but from the case of *Fletcher vs. Peck*, 6 Cranch, 87, 130, to the present time we have uniformly refused to inquire into the motives of legislative bodies."

* * * * *

"It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice."

And in *Soon Hing vs. Crowley*, 113 U. S. 763, 719, the court said:

"The principal objection, however, to the ordinance is founded upon the supposed hostile motives of the supervisors in passing them. * *

The rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the Legislators in passing them except as disclosed on the face of the acts. * * * Their motives considered as the moral inducements for their votes will vary with the different members. The diverse character of such motives and the impossibility of penetrating into the hearts of men preclude all such inquiries as impracticable and futile."

In *State vs. Gordon*, 223 Mo. supra, the court said:

"The vote of the People on a proposition stands as in the nature of a legislative act" (p. 17).

A good case on the whole subject, showing that the foregoing rules apply to electors as quasi-legislative bodies, with particular force, and forbid courts to im-

pugn their motives or knowledge and sustaining a submission to the electors as against minor defects, is the case of *Allen vs. State*, 44 L. R. A. (N. S.) 468, 469, 472, 477-8:

"Timely appeal to the courts upon the questions now raised, if meritorious, would have settled the matter before the election was held. However, the measure was submitted to the voters without question. They were invited to believe that the formalities of the law pertaining to the submission of the measure had been fully met. The expense of the election was incurred, and the electors, imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through a mere hollow form, we may assume, investigated the question, and went to the polls and voted thereon. * * *

If such sanctity and verity may be given to the acts of the delegated representatives of the people in legislative body assembled, it must with clearer reason and with greater force be given to the governmental power, the record of which, in its lawmaking capacity, is authenticated and promulgated as the Constitution provides. * * *

In Constitutional Prohibitory Amendment, 24 Kan. 700, a case in some respects similar to this one, that court, speaking through *Justice Brewer* (afterwards associate justice of the Supreme Court of the United States), at page 720, said: 'After the contest was ended and election over, the claim is for the first time made that after all there was nothing in fact before the people; that this whole canvass, excitement, and struggle was simply a stupendous farce, meaning nothing, accom-

plishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of such majority. *Gilleland vs. Schuyler*, 9 Kan. 569; *Morris vs. Vanlaningham*, 11 Kan. 269; *Wildman vs. Anderson*, 17 Kan. 344; *Jones vs. Caldwell*, 21 Kan. 186; *Lewis vs. Bourbon County*, 12 Kan. 186. In the opinion of the case last cited, we said, speaking of a case somewhat similar: "Notwithstanding the silence of the statute and the omissions of the order, an election would, doubtless, be valid, where the people generally acquiesced in the manner and took part in the election." We could not have used language more apt if we had been anticipating this very case. While estoppel may not technically bind either party to an election, yet where a mere defect of form exists, which may, if presented seasonably, be fully corrected, and is not suggested until after the election is over, there is eminent justice in applying the principles of estoppel, and holding that they who have gone to trial on the merits shall not, when beaten there, go back to an amendable defect in the preliminary proceedings.' "

The principle, in short, is that the legislators—in this instance the people—in exercising their sovereign prerogative of law making, are not infants, subject to the guardianship of courts, but they are conclusively pre-

sumed to know their own minds, made up upon grounds satisfactory to themselves.

The proceedings in this instance:

In the light of these rules and decisions let us examine the proceedings in this case.

The ordinance was first introduced in the Common Council on January 6th, 1920, following receipt of a message from the Mayor relative to same. On January 27th the ordinance was passed, effective February 27th. On February 24th, 1920, the Common Council authorized the Board of Street Railway Commissioners to print copies of the ordinance with a map of the proposed routes thereon (R. p. 64). The distribution of these pamphlets continued up to the date of election and the contents of same was not considered sufficiently prejudicial of any rights of plaintiff or others to ask that the distribution of same be enjoined. These matters now alleged as misrepresentative and misleading were all matters of minor consequence during the campaign—*then* the question being whether the City should proceed to actual municipal ownership and operation.

The proposition was simple and easily understood. It was:

“Shall the City of Detroit be authorized and empowered to acquire, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places of the City of Detroit and within a distance of ten miles from any portion of its corporate limits that the public convenience may require, for the purpose of supplying transportation to the City of Detroit and the inhabitants thereof, as hereinafter designated,

to-wit: (Here follows description of streets) and to borrow money on the credit of the City of Detroit by issuance of the public utility bonds of the City of Detroit up to an amount not to exceed \$15,000,000, for the purpose of so acquiring and owning said street railway system."

(A copy of the ballot upon which this question appears is found at R. p. 81.)

The electors were not asked whether they favored the *construction* of a new system or the *purchase* of an existing system; they were asked to *authorize* and *empower* the City of Detroit to *acquire*, own, maintain and operate a street railway system upon certain designated streets and to borrow \$15,000,000 for the purpose of so *acquiring* and owning said system.

Let us further analyze the ordinance. Its title indicates it to be, among other things, "An Ordinance relative to acquiring, owning, maintaining and operating a street railway system upon the surface of the streets, alleys and public places of the City of Detroit and within a distance of ten miles from any portion of its corporate limits *that the public convenience may require* for the purpose of supplying transportation to the City of Detroit and the inhabitants thereof."

Section 1 provides that the Common Council of the City of Detroit declares a public improvement to be necessary in the City in connection with transportation matters upon the streets, alleys and public places described.

Section 2 provides for the submission of a proposition in order to authorize and empower the City to acquire, own, maintain and operate a street railway sys-

tem upon such streets, alleys and public places as designated and in order to empower the City to borrow \$15,000,000 to finance same.

Section 3 provides that in order to carry out the purposes of the ordinance that a special election be held on April 5th, 1920, and said *proposition* be at that time voted upon.

Section 4 provides that "if any clause in this ordinance shall, for any reason, be adjudged or decreed to be invalid by any court of competent jurisdiction, such judgment or decree shall not effect, impair or invalidate the remainder of this ordinance, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy."

Firstly, it will be noted that the people did not vote upon the ordinance; they were voting upon a *proposition* of whether the City should be *authorized* to acquire a street railway system and to provide funds to pay for it.

Secondly, it will be noted that the proposition is not whether the city *shall* construct the lines designated, but the proposition is "Shall the City of Detroit be *authorized and empowered to acquire, own, maintain and operate a street railway system.*"

Thirdly, the lines to be acquired is a question for the public authorities to determine from time to time within the provisions of the Charter. If it should be determined that *existing* lines be taken over it could only be done by a subsequent approval of the voters. No claim is made in the bill that it was ever asserted that *existing* lines could be purchased, condemned or leased without a subsequent approval of the voters. It is entirely conceivable that the Detroit United Railway might wish to take ad-

vantage of its occupation of the streets and demand an excessive valuation. The proposition, not being limited to purchase, gives the City the power to construct and the money to pay for it. Inasmuch as it was public knowledge that no contract existed for the purchase of the Woodward Avenue and Fort Street lines and that Company could refuse to sell same, thus requiring the very disarrangement of traffic and public inconvenience it argues those voting for the proposition never intended, how can it be presumed, as contended for by plaintiff, that the voter did not intend such a result? It may be they hoped such would not be the result, but they certainly authorized and intended to authorize construction on these streets if purchase could not be effected.

There is nothing in the proposition that defined when or in what order of development the lines shall be acquired. There is nothing in the proposition that requires any or all of said lines to be constructed or purchased.

The City of Detroit has been attempting to solve its street transportation problems for a period of twenty-five years. Since 1893 no franchise has been granted to any street railway utility. As early as 1899 the City, under a state law, attempted to acquire the existing street railway system. In *Attorney General vs. Pingree*, 120 Mich. 550, the Supreme Court decided no municipality had the constitutional right to engage in municipal ownership and operation. In 1907 the City attempted to construct tracks on the claim same were a part of the street improvement, but this was prohibited (*Attorney General vs. Detroit Common Council*, 148 Mich. 77). In 1908 the constitution was amended and sections 23, 24 and 25 of Article VIII provided for such municipal ownership and operation upon approval by

a three-fifths vote. Then followed the enabling provisions of the Home Rule Act and in 1913 the municipal ownership amendment to the City Charter. Since 1913 two propositions to buy the existing system have been defeated by the people. Municipal ownership opponents contested each of these steps (*Attorney General vs Common Council*, 164 Mich. 371) (*Attorney General vs. Lindsay*, 178 Mich. 546). The mischief and evil which the proposition of April 5th, 1920, was designed to cover was congested cars, lack of seats, loss of time and a correction of an intolerable transportation system. The legislative and judicial history thus clearly establishes the conviction that the people desired to solve their transportation difficulties by municipal ownership and operation and that they acted with great deliberation.

To hold that the 89,785 people who voted for this proposition were deceived or did not understand what they voted for would be an act of injustice.

If any misunderstanding exists among those who voted for the proposition, a full remedy exists. Under Chapter II, Title III, of the Charter, provision is made for the initiative. If the conditions complained of in the bill actually exist the people have easy redress to relief by preparing an initiatory ordinance for the repeal of the proposition.

In *Wheeler vs. City of Denver*, 231 Fed. Rep. 16, it was said:

"We are also of the opinion . . . that the validity of the bonds must be determined from an examination of said section and that alone—we are strongly persuaded to adopt their views, not only from the language used, but from a

consideration of the fact that the electors of the city and county of Denver knew of the trouble existing between the city and county of Denver and the Denver Union Water Company and that they legislated particularly with reference thereto."

Contents of Proposition.

We think it is clear from counsel's brief that plaintiff recognizes that said proposition standing alone and adopted by the requisite vote would be a valid submission. But plaintiff says the people were deceived because a part of section one of the ordinance was not a part of the proposition.

This argument by counsel for plaintiff and appellant proceeds upon two material misconceptions of facts. They state (1) that the *ordinance* of February 27th, 1920, was voted on by the people and that (2) a *sample ballot* was submitted to the people. The ordinance of February 27th, 1920, was not voted on by the people, and (2) no sample ballot was submitted to the people. A pamphlet containing the essential parts of the ordinance and plan was circulated.

The matter voted upon was the *proposition* contained in section 2 of the ordinance of February 27th, 1920. Sections 1, 3, 5 and 6 of the ordinance were not submitted, as same were merely matters of detail in no way involved in the proposition itself.

(a) Complaint is alleged because the Proposition did not contain the expression:

"And said Board of Street Railway Commissioners shall construct, own, maintain and oper-

ate in said City of Detroit for said City of Detroit and within a distance of ten miles from any portion of its corporate limits."

This sentence is found in one part of Sec. 1 of the Ordinance and the claim is it ought to have been included in the Proposition, but the answer is two-fold:

First: The Proposition was not in any way dependent upon the terms of Sec. 1 of the Ordinance, they might even have been in express conflict with each other without in any way invalidating the People's vote. There was and is no necessary connection between the two, the Ordinance could have been enacted at another time, before or after—or not at all—and it would not have affected the validity of the People's vote.

And, *Second:* The reason this expression does not appear in the proposition was because the council did not care to limit the authority asked of the people and the use of the \$15,000,000 to *construction* only. It was desired to obtain a vote upon the proposition to authorize a comprehensive plan for a municipal street railway which would enable the public authorities to then decide whether such acquisition should be by purchase, condemnation, lease, by construction or by any combination of these methods, without increase of the sum first requested.

This particular provision of Section one can have no possible relation to any claim of fraud or misrepresentation. It does not limit the proposition contained in Section two. *Section one could have been amended any time before election and can be amended now*, so long as it does not exceed the authority conferred by the people in the proposition. The ordinance submitting the proposition would have been effectual without section one.

But the language of the ordinance directing the Street Railway Commission to *construct* the lines described (even if this were the only language in Sec. 1) would not prevent the Commission from purchasing existing trackage provided the contract of purchase be approved by the voters. No such absurd limitation is contained in the legal meaning of the word *construct*.

In *Attorney General vs. Detroit Common Council*, 148 Mich., page 92, the Supreme Court held:

"If the City possesses the power to lay tracks as a part of the street structure, for the same reason it has a right to purchase those already laid from the company or companies owning them. *The right to construct necessarily implies the right to purchase.*"

Plaintiff confuses entirely the distinction which plainly exists between *authority* to purchase and mere approval of a specific contract of purchase.

Suburban lines:

(b) Plaintiff also asserts that the City of Detroit cannot lawfully obtain the right to construct lines in Highland Park or Hamtramck (these are suburbs of Detroit, lying wholly within the city limits, but having separate municipal organizations) and that the proposition is void because said lines are an essential part of the municipal system. No authority is cited for this statement. On the contrary, Section 23, Article VIII, of the Michigan Constitution provides:

"Subject to the provisions of this Constitution, any city or village may acquire, own and operate, either within or *without its corporate limits* pub-

lic utilities for * * * transportation to the municipality and the inhabitants thereof * * * and may operate transportation lines *without the municipality* within such limits as may be prescribed by law * * *

Section 3307, Michigan Compiled Laws of 1915, as amended, provides:

"Each city may in its charter provide:

(j) For owning, constructing and operating transportation facilities within its limits and its adjacent and adjoining suburbs within a distance of ten miles from any portion of its city limits * * *

(k) * * * for the acquirement, ownership, establishment, construction and operation, either within or without its corporate limits, of public utilities for supplying * * * transportation to the municipality and the inhabitants thereof * * * and for the operation of transportation lines *without the municipality* and within ten miles from its corporate limits."

Chapter XIII, Title IV, of the City Charter, contains similar provisions.

There is thus full constitutional and statutory power to enable the city to obtain the right to construct lines in these municipalities with their consent.

Plaintiff further asserts that the construction of tracks in Hamtramck and Highland Park is an essential part of the municipal system. That this is not so is apparent from a study of the map. The trackage represents but a small fraction of the total mileage. Lines can be stopped at the boundaries of each of these municipalities without interfering with the plan of the municipal

railway system. This would merely change the point of origination of traffic, but any passenger may still go directly to any other point on the city system. These lines are in no sense an essential part of the city system.

It will be noted that the language of the proposition is limited to the acquisition of such lines within 10 miles of the corporate limits *that the public convenience may require* (R. p. 80). Whether the public convenience requires these lines is certainly a legislative matter for the public authorities to pass upon when reached, and is not a judicial question.

A study of the bill indicated that great stress is laid upon the general layout of the City of Detroit; that the proposed Municipal System would not fit into this layout; that if traffic was stopped on the Fort Street lines the public would suffer inconvenience. A sufficient answer to all such claims would seem to be the admitted fact that the people in whose concern the plaintiff shows such interest voted favorably thereon.

Instructions:

(c) Objection is also made to the instructions to voters which appear upon the pamphlet distributed prior to the election. No objection is made to the instructions which appear upon the ballot voted upon by the electors.

Section 9, Chapter 1, Title II, of the Charter, provides:

"The election commission shall have authority to place on the ballot such headings and instructions and such endorsements as it shall deem proper and sufficient."

The instructions appearing upon the pamphlet in this case are in no respect analogous to the Illinois case cited

by plaintiff. There the objection was made because the voter was instructed to vote "yes" if he believed in municipal ownership. Here the instruction on the pamphlet was to vote "yes" if he favored the acquisition, ownership, maintenance and operation of a municipally owned street railway system in the City of Detroit and to vote "no" if such a proposition was not favored. The entire proposition was before the voter and it cannot be said that this was in any sense an appeal to everybody who believed in municipal ownership but who might not favor the particular proposition. But this instruction was merely the informal and unofficial wording of the Board of Street Railway Commissioners on a matter of publicity prior to the election.

The instruction on the official ballot prepared by the City Election Commission was as follows:

"If you favor the following proposition put a cross (X) in the square after the word *Yes*. If you do not favor the following proposition put a cross (X) in the square after the word *No*."

There was no appeal in this to the voter because he favored municipal ownership; no reference was, in fact, made to municipal ownership; the instruction was directed solely to the proposition contained on the ballot. It would be hard to conceive of a fairer instruction than that appearing in the instant case.

While we have thus demonstrated that the instruction was legal and proper nevertheless we deem it meet to call the attention of the Court to the fact that there is no allegation in the Bill of Complaint on this point.

To conclude we respectfully submit:

(1) The District Court was without jurisdiction and the proper order in that case should be made; or (2) the Decree should be affirmed.

Respectfully,

Clarence E. Wilcox.

Alfred Lucking.

Counsel for Appellee.

APPENDIX

Chapter XIII of Charter of City of Detroit of 1918.
STREET RAILWAY COMMISSION.**Municipal Ownership and Operation of Street Railway System:**

Section 1. The city shall at once proceed to, and as soon as practicable acquire or construct and own, maintain and operate a street railway system beneath, upon and above the surface of the streets of the city and within a distance of ten miles from any portion of its limits that the public convenience may require; and as soon as practicable said system shall be made exclusive. Nothing herein contained shall be construed to prevent the city from making a grant to private parties in relation to said street car system beneath, upon and above said streets.

Commission Created; Appointment; Compensation; Removal:

Sec. 2. There shall be a board to be known as the Board of Street Railway Commissioners, which shall consist of three members, who shall be appointed by the mayor. Said board shall serve without salary and be subject to removal at the will of the mayor.

Oath; Bond; Vacancies; Officers and Assistants:

Sec. 3. Each commissioner shall take and file in the office of the city clerk the oath of office prescribed for city officers and shall execute a bond in a sum to be

determined by the mayor, conditioned as is prescribed for city officers. Any vacancy on said board shall be filled by the mayor. The board shall name a president and secretary. Said board shall have full power and authority to appoint a general manager, and to employ inspectors, accountants, attorneys and other officers, agents and servants for the purpose of enabling it to properly perform all of the duties incumbent upon it, and shall pay them out of the earnings of the said railway system.

Assistance of Other Departments:

Sec. 4. The board shall have power to call upon the city engineer, city clerk, commissioner of public works or other city officers for any service that may be required in connection with the work of said board.

Deeds; Contracts; Leases; Purchases:

Sec. 5. All deeds, contracts, leases or purchases shall be made in the name of the city of Detroit by the president of said board and the secretary thereof.

Duties of Board:

Sec. 6. It shall be the duty of said board to proceed promptly to purchase, acquire or construct and to own and operate a system of street railways in and for the city, and as soon as practicable to make said system exclusive. Said board shall, whenever it deems it necessary, build extensions and new lines. Such extensions and new lines shall be first approved by the common council.

Aquisition of System:

Sec. 7. Said board may purchase or lease, or by appropriate proceedings prescribed by law and in the name of the city condemn all or any part of the existing street railway property in the city and in like manner said board shall have power to aquire a street railway property without the limits of the city as prescribed by law, if the board shall determine; or it may make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate, and said board shall construct, own, maintain and operate in said city for said city and within a distance of ten miles from any portion of its limits as aforesaid, a system of street railways beneath, upon and above such streets and other places in the city and outside thereof as aforesaid as the common council shall from time to time elect.

Approval by Electors:

Sec. 8. Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths of the electors voting thereon at any regular or special election, and upon such proposition women tax payers having the qualifications of male electors shall be entitled to vote.

General Bonds:

Sec. 9. The common council shall on the request of the board issue, in such amounts as will not exceed the legal bonding limit of the city, bonds of the city to be known as public utility bonds up to the amount of two per cent of the assessed value of the real and personal property of the city. Said bonds shall be payable by the city at such time or times and at such rate of interest as the board and common council may determine. The common council shall sell all or any part of said bonds at any time and from time to time upon the request of the board and pay the proceeds to the city treasury and said proceeds shall be used for the purpose of securing in some one of the ways herein provided a public street railway system in the city and within the ten miles outside aforesaid.

Sec. 10. The common council shall likewise on request of the board issue further or additional bonds of the city, to be known as street railway bonds in such denomination and payable at such time or times and bearing such rate of interest as the council and said board may determine. These bonds may be issued regardless of the city's bonding limit. Said bonds shall impose no liability on the city and shall be secured only upon the property and revenues of the street railway system, including a franchise stating the terms upon which in case of foreclosure and purchase, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of purchase of the street railway system and the franchise on foreclosure.

Sec. 11. The board shall prepare a franchise and submit the same to the common council and the council shall submit it to the electors of said city, and if approved by three-fifths of the electors voting thereon said franchise shall be valid. If not approved by the electors, the board shall continue to prepare and present franchises as aforesaid until a franchise is approved by three-fifths of the electors voting thereon at any general or special election.

Sec. 12. When the franchise has been submitted and approved by the electors as herein provided, then the board may request, and the common council shall issue and sell enough of said street railway bonds to complete the payment of the purchase price or the award in condemnation proceedings or the cost of construction, and whenever any extension to said street railway system is authorized as herein provided, the common council shall issue and sell a further and additional amount of said street railway bonds sufficient to pay the actual cost of the extension and no more. It shall pay and deliver into the city treasury the proceeds of said additional issue of street railway bonds and out of said proceeds the board shall pay the cost and expenses of said extension.

Sec. 13. The board, subject to the approval of the mayor, shall have the supervision, management and control of the entire public street railway system of Detroit, both in its construction and maintenance and operation as fully and completely as if said board represented private owners. The board shall report its doings to the common council annually and at such other times as the council may direct.

Rate of Fare:

Sec. 14. The rate of fare on said street railway system shall be sufficient to pay, and the said board shall cause to be paid:

- (a) Operating and maintenance expenses, including paving and watering between tracks;
- (b) Taxes on the physical property of the entire street street car system, the same as though privately owned;
- (c) Fixed charges;
- (d) A sufficient per cent per annum to provide a sinking fund to pay the principal of the mortgage bonds issued at their maturity and such other additional per cent per annum to provide, in the sound discretion of the board, a sinking fund to pay the principal of the general bonds issued as soon as practicable, to the end that the entire cost of said street railway system shall be paid eventually out of the earnings thereof.

Apparatus; Appliances; Sale of Light, Heat and Power:

Sec. 15. Said board shall have power to secure, erect or install the necessary apparatus, appliances and connections and to supply or sell from its surplus, if any, electric light, heat and power to any and all applicants therefor at a reasonable price, but not below cost: provided, that whenever the public lighting commission is prepared to furnish all or any part of the power required by the board for its purposes, such board shall procure said power from such commission.

Plant: By-Products:

Sec. 16. The board shall as soon as practicable, have in use and shall thereafter maintain a plant or plants with suitable modern economies and may sell, consume or distribute all its by-products.

Claims:

Sec. 17. All claims that may arise in connection with said railway system shall be presented as are ordinary claims against the city. Provided, that written notice of all claims based upon injury to persons or property must be served upon the city clerk, within sixty days from the happening of the injury, but the disposition thereof shall rest in the discretion of the board and the cost of investigation, attorney's fees, all claims that may be allowed and final judgments obtained from said claims shall be paid from the operating revenues of said railway.

Penalty for Injury to Property:

Sec. 18. Any person who shall cut, break, injure or destroy any of the property owned by the city and in control of said board, with intent to prevent or interrupt the business of the board, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment not exceeding sixty days or both fine and imprisonment in the discretion of the court. Proof that the act was wilful shall be prima facie evidence of such intent.

Arbitration of Disputes with Employees:

Sec. 19. In case of dispute over wages or condition of employment, said board is hereby authorized and directed to arbitrate any question or questions, provided each party shall agree in advance to pay half the expense of such arbitration.

Annual Estimate:

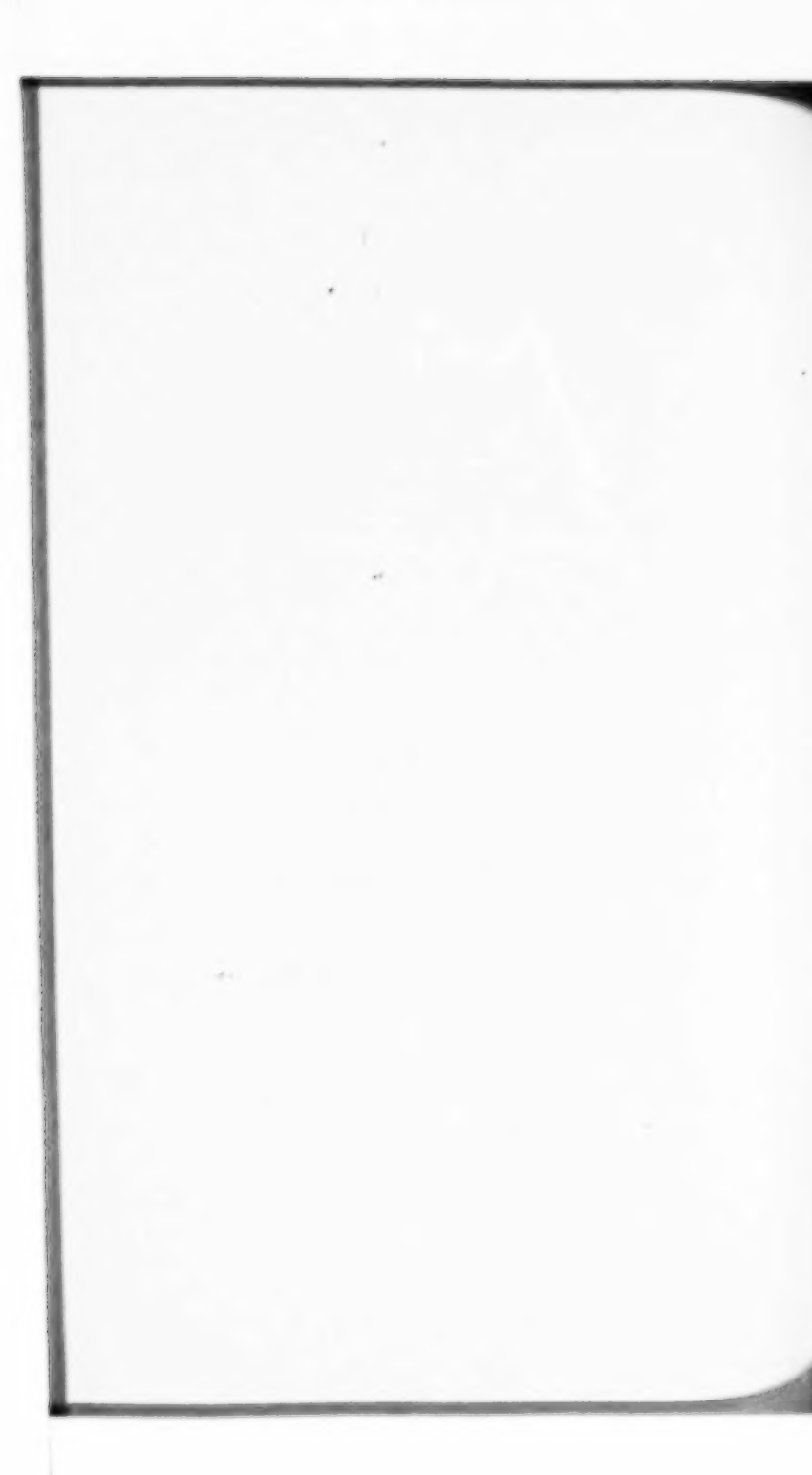
Sec. 20. On or before the fifteenth day of January of each year, the board shall transmit to the city controller its estimate in duplicate of the amount of money required for its purposes for the ensuing fiscal year. The common council may adopt ordinances not in conflict herewith to carry out the purposes and provisions of this chapter.

Disbursements:

Sec. 21. All money received from any source in relation to said street railway shall be paid into the city treasury and disbursed and paid out only upon vouchers signed by the president and secretary of the board and duly approved and countersigned by the controller.

President of Commission Ex-Officio Member of Board of Supervisors:

Sec. 22. The president of the commission shall be a member ex-officio of the board of supervisors of the County of Wayne.



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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 492.

DETROIT UNITED RAILWAY, APPELLANT,

VS.

CITY OF DETROIT, APPELLEE.

ADDENDA TO BRIEF FOR APPELLEE, CITY OF DETROIT.

CLARENCE E. WILCOX,
ALFRED LUCKING,

Counsel.

ADDENDA TO BRIEF FOR APPELLER, CITY OF DETROIT.

Bottom of p. 32—That had motives of City Officials will not deprive city of its right to remove plaintiff's property from street.

Doyle vs. Continental Insurance Code, 94 U. S., 541-2.

Top of p. 43—That there is a vital difference between a water supply case, and supplying street railway transportation.

Attorney General vs. Fongsee, 120 Mich., 561-2.

Top of p. 65—That it was competent and proper to submit the proposition on ballot exactly as done in this case.

Clark vs. Manhattan, 1 A. L. R., 1534 (175 Cal., 637).

Oakland vs. Thompson, 151 Cal., 576.

Thompson Co. vs. City, 42 Fed., 723, 727.

Middle of p. 81—No estimate of cost was required to go with the submission; an election not invalid because cost will prove (as alleged in bill) greater than amount voted.

Wheeler vs. Denver, 231 Fed., 8.

(Appeal dismissed, 245 U. S., 626.)

People vs. Kelley, 76 N. Y., 492-494.

Chostkov vs. Pittsburgh, 177 Fed., p. 936.

Marcy vs. Onkosh, 31 L. R. A. (N. S.), 799.

Middle of p. 67—That courts will conclusively presume full and accurate knowledge and good faith on part of legislators, allegations that legislation is obtained by misrepresentations, etc., amount to nothing.

U. S. vs. Des Moines, 142 U. S., 544-5.

Top of p. 72—That the same rules apply to Legislative Acts by the sovereign people (by referendum).

State vs. Gordon, 223 Mo., p. 23.

Allen vs. State, 44 L. R. A. (N. S.), 468.

Epping vs. Columbus, 117 Ga., 285.

Top of p. 58—That no franchise by implication of law against positive constitutional provision.

Carpenter, J. (one of appellants' counsel in this case).

Attorney General vs. Detroit Common Council, 148 Mich., 79.

Middle of p. 42—That the Michigan Constitution is a bar against any such new franchise as claimed in this case.

First Denver Water Case, 229 U. S., 139-140.

Mr. Justice Hughes participated in this judgment.

Bottom of p. 58—That no franchise by implication of law on account of public necessity for service.

Detroit vs. D. U. R., 172 Mich., 136.

Same case, 229 U. S., 39.

Mr. Justice Hughes participated in this judgment.

Middle of p. 58—That no implied franchise from necessity of city for service even where the service has been accepted after expiration of franchise.

Cedar Rapids Water Case, 118 Ia., 235, 239.

Middle of p. 22—That it is perfectly lawful for city to make offer for plaintiff's property in street, or notify it to remove same.

Denver vs. New York Trust Co., 229 U. S., 123.

Mr. Justice Hughes participated in this judgment.